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No. 10-___

IN THE

Supreme Court of the United States

FRANCIS GATIMI, JANE GATIMI, & COLLINS GATIMI,
Petitioners,

v.

ERIC H. HOLDER, JR.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A provision of the Equal Access to Justice Act ("EAJA") applicable to federal court proceedings reviewing agency immigration determinations, 28 U.S.C. § 2412(d)(1)(A), provides in relevant part that a court "shall award to a prevailing party other than the United States fees and other expenses" unless "the court finds that the position of the United States was substantially justified." In this case, the United States Court of Appeals for the Seventh Circuit reviewed and reversed an immigration determination on multiple grounds. But the court denied a subsequent request for attorney's fees under the EAJA in its entirety.

This petition for a writ of certiorari presents the following two questions:

1. Did the Seventh Circuit correctly hold that, in an immigration case, for purposes of determining eligibility for an award of attorney's fees under the EAJA, the "position of the United States" includes the decision of the Board of Immigration Appeals but does not include the underlying decision of the Immigration Judge?

2. Did the Seventh Circuit correctly hold that the EAJA permits wholesale denial of an application for attorney's fees, even though the "position of the United States" was "substantially justified" as to only one of several issues presented, because in the court's view that issue was "more prominent"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE SEVENTH CIRCUIT'S HOLDING THAT THE "POSITION OF THE UNITED STATES" IN IMMIGRATION CASES DOES NOT INCLUDE THE DECISION OF THE IJ IS IN CONFLICT WITH OTHER CIRCUITS, AND CANNOT BE SQUARED WITH THE EAJA'S PLAIN LANGUAGE, ITS LEGISLATIVE HISTORY, OR THIS COURT'S PRECEDENTS. 8

II. THE SEVENTH CIRCUIT'S APPROACH TO WHETHER THE POSITION OF THE UNITED STATES WAS "SUBSTANTIALLY JUSTIFIED" EXACERBATES A NOW DEEP AND INTRACTABLE CIRCUIT SPLIT. 12

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ADDRESS BOTH OF THESE DISPUTED EAJA-RELATED ISSUES, FREQUENTLY RECURRING AND IMPORTANT TO THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY'S IMMIGRATION COURTS. 17

CONCLUSION 19

TABLE OF CONTENTS
(continued)

Page

Oral Decision of the Immigration Judge (Sept. 17, 2007) 1a

Decision of the Board of Immigration Appeals (Aug. 4, 2008) 14a

Opinion of the United States Court of Appeals for the Seventh Circuit (Aug. 20, 2009) (Merits) 22a

Opinion of the United States Court of Appeals for the Seventh Circuit (May 17, 2010) (Fees and Costs) 35a

Order of the United States Court of Appeals for the Seventh Circuit (July 12, 2010) (denying rehearing *en banc*) 45a

TABLE OF AUTHORITIES

Page(s)

CASES

CEMS, Inc. v. United States,
65 Fed. Cl. 473 (2005) 15

Cinciarelli v. Reagan,
729 F.2d 801 (D.C. Cir. 1984) 16

Commissioner, INS v. Jean,
496 U.S. 154 (1990) 6, 7, 10

Ellis v. United States,
711 F.2d 1571 (Fed. Cir. 1983) 16

Goldhaber v. Foley,
698 F.2d 193 (3d Cir. 1983) 16

Golembiewski v. Barnhart,
382 F.3d 721 (7th Cir. 2004) 4

Hackett v. Barnhart,
475 F.3d 1166 (10th Cir. 2007) 12

Haitian Refugee Center v. Meese,
791 F.2d 1489 (11th Cir. 1986) 14

Hensley v. Eckerhart,
461 U.S. 424 (1983) 7, 13, 17

Hernandez-Aquino v. Ashcroft,
48 F. App'x 240 (9th Cir. 2002)
(unpublished opinion) 16

Johnson v. Gonzales,
416 F.3d 205 (3d Cir. 2005) 12

Liu v. Ashcroft,
380 F.3d 307 (7th Cir. 2004) 9

Nken v. Holder,
2010 WL 2640255 (4th Cir. June 24, 2010)
(per curiam) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Perales v. Casillas,
950 F.2d 1066 (5th Cir. 1992) 12

Roanoke River Basin Ass'n v. Hudson,
991 F.2d 132 (4th Cir. 1993) 15

Russell v. National Mediation Board,
775 F. 2d 1284 (5th Cir. 1985) 13, 14

Thangaraja v. Gonzales,
428 F.3d 870 (9th Cir. 2005) 6, 11

United States v. Dolorosa Street,
190 F.3d 977 (9th Cir. 1997) 16

United States v. Rubin,
97 F.3d 373 (9th Cir. 1996) 16

Vacchio v. Ashcroft,
404 F.3d 663 (2d Cir. 2005) 12

Wedra v. Thomas,
623 F. Supp. 272 (S.D.N.Y 1985) 15

STATUTES

8 U.S.C. § 1252(b)(1) 4

8 U.S.C. § 1362 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2412 1

28 U.S.C. § 2412(d)(1)(A) 7

28 U.S.C. § 2412(d)(1)(C) 7

28 U.S.C. § 2412(d)(2)(D) 3, 6, 10

REGULATIONS

8 C.F.R. § 1003.1(b)(3) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

8 C.F.R. § 1240.15 4

OTHER AUTHORITIES

Department of Homeland Security, Office of Immigration Statistics, "2009 Yearbook of Immigration Statistics" (Aug. 2010) (last visited Oct. 1, 2010) 18

H.R. Rep. No. 99-120 (pt. 1) *reprinted in* 1985 U.S.C.C.A.N. 132 10

Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007) 18, 19

TRACImmigration, "Immigration Judges," http://trac.syr.edu/immigration/reports/160/ (last visited Oct. 1, 2010) 18

PETITION FOR WRIT OF CERTIORARI

Francis Gatimi, Jane Gatimi, and Collins Gatimi respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

An order of removal entered by an Immigration Judge ("IJ") (Pet. App. 1a-13a) and an order entered by the Board of Immigration Appeals ("BIA") dismissing an appeal from the IJ's order (Pet. App. 14a-21a) are unreported.

The opinion of the United States Court of Appeals for the Seventh Circuit granting the Gatimis' Petition for Review of the IJ's and BIA's orders (Pet. App. 22a-34a) is reported at *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) ("*Gatimi I*"). The Seventh Circuit's order denying the Gatimis' request for fees and costs under the EAJA (Pet. App. 35a-44a) is reported at *Gatimi v. Holder*, 606 F.3d 344 (7th Cir. 2010) ("*Gatimi II*"). The Seventh Circuit's order denying rehearing *en banc* (Pet. App. 45a) is unreported.

JURISDICTION

The Seventh Circuit's order denying the Gatimis' request for attorney's fees under the EAJA was entered on May 17, 2010. Pet. App. 35a. The Seventh Circuit's order denying rehearing *en banc* was issued on July 12, 2010. Pet. App. 45a. This Petition is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include two subparts of 28 U.S.C. § 2412. The first, § 2412(d)(1), states:

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record

> (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.
>
> (C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

The second, § 2412(d)(2)(D), states:

> "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

STATEMENT OF THE CASE

The Gatimis (Mr. Gatimi, Mrs. Gatimi, and their daughter), natives of Kenya, sought asylum in the United States. An IJ denied their application, holding that Mr. Gatimi had not faced past persecution, that Mr. Gatimi was not a member of a "particular social group," and that Mrs. Gatimi did not have a well-founded fear of future persecution in

the form Female Genital Mutilation ("FGM") if removed to Kenya. The Gatimis appealed the IJ's decision to the BIA. 8 C.F.R. §§ 1003.1(b)(3) & 1240.15. The BIA dismissed the appeal, relying on two of the three bases articulated by the IJ: that Mr. Gatimi was not a member of a particular social group and that Mrs. Gatimi did not have a well-founded fear of persecution.

The Gatimis petitioned the Seventh Circuit Court of Appeals for review of the agency's decisions. 8 U.S.C. § 1252(b)(1). In a published opinion, the Seventh Circuit held that Mr. Gatimi had indeed faced past persecution, describing the IJ's contrary conclusion as "absurd." Pet. App. 25a. The court also rejected the BIA's underlying "formula" for determining membership in a particular social group, which included a requirement that members be "socially visible," stating that the formula "makes no sense" and had not been explained by the BIA. *Id.* at 28a. Finally, the court rejected the agency's conclusion that Mrs. Gatimi did not have a well-founded fear of FGM, adding that on this point the IJ had "lapsed into incoherence." *Id.* at 25a. And while the BIA had stated that there was no evidence to support the claim, the Seventh Circuit disagreed, explaining that, indeed, "the only evidence in the record" was "contrary" to the BIA's decision. *Id.* at 33a.

Given the "strong language" in the Seventh Circuit's opinion critical of the agency's work, *see Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004), the Gatimis filed a timely application for attorney's fees under the EAJA. But in a published decision authored by Judge Posner, the Seventh

Circuit rejected the Gatimis' application in its entirety. Pet. App. 44a. While the court concluded that the BIA's decision was part of the "position of the United States," it held that the underlying decision of the IJ regarding Mr. Gatimi's past persecution—which it had previously described as "absurd"—was merely "the mistake of a subordinate agency official," was "not automatically the 'position of the United States,'" was "a stumble on the way to the formulation of that position," and was thus "not an adequate basis for an award of fees." *Id.* at 38a.

On the two remaining issues, which the BIA had decided and the Seventh Circuit had reversed (Mr. Gatimi's "particular social group" claim and Mrs. Gatimi's fear of future persecution in the form of FGM), the court held that the position of the United States was "substantially justified" only as to the first. *Id.* at 39a. However, rather than granting the award of fees in full—or at least allocating it across the issues—the court concluded that the "particular social group" issue was the "more prominent" of the two. Accordingly, the court reasoned that the entire request for fees under the EAJA had to be denied. *Id.* at 43a. Rehearing *en banc* was later denied. *Id.* at 45a.

The Gatimis now petition this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This petition presents two questions implicating well-established circuit splits regarding the proper application of the EAJA. Each by itself justifies a grant of certiorari. Presented together, in this well-suited vehicle, they certainly merit this Court's attention.

1. In this case, the Seventh Circuit (in conflict with the Ninth Circuit and in tension with others) took an unduly crabbed view of what constitutes the "position of the United States" for purposes of an EAJA analysis in immigration matters. If, as the statute says, the "position of the United States" includes "the action or failure to act by the agency upon which the civil action is based," 28 U.S.C. § 2412(d)(2)(D), in immigration cases it must necessarily encompass the IJ's decision. Yet, although the Seventh Circuit recognized that the IJ's decision as to past persecution of Mr. Gatimi was "absurd"—thus necessitating further litigation—it nonetheless held that the IJ's decision was not part of the "position of the United States" for purposes of determining an award of fees under the EAJA. Pet. App. 38a. In contrast, the Ninth Circuit has explicitly held that the position of the United States includes the IJ's decision. *Thangaraja v. Gonzales*, 428 F.3d 870, 873 (9th Cir. 2005). And more generally, the Second, Third, Fifth and Tenth Circuits have held that underlying agency misconduct must be included in the "position of the United States."

As this Court recognized in *Commissioner, INS v. Jean*, 496 U.S. 154, 159 n.7 (1990), the EAJA mandates a "single evaluation" of agency conduct to determine the position of the United States. Relevant legislative history confirms as much. This Court should grant certiorari and reverse the judgment of the Seventh Circuit on this ground.

2. The Seventh Circuit's decision here also exacerbates an already intractable circuit split concerning the related question of how to analyze an

award of EAJA fees where the position of the United States is "substantially justified" as to less than all issues raised. The EAJA's "shall award" language is mandatory. *See* 28 U.S.C. § 2412(d)(1)(A). A court may "reduce . . . or deny an award" only if the prevailing party engaged in conduct that unduly protracted the litigation. *Id.* § 2412(d)(1)(C). Yet, although the Seventh Circuit here conceded that the position of the United States was not substantially justified as to all matters, the court held that because the position of the United States was substantially justified as to what the court deemed the "more prominent" issue, an EAJA award could be denied altogether. Carving up the government's position into multiple pieces in this way is at odds with this Court's guidance in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Jean*, 496 U.S. 154.

The result of this novel approach is that the circuits are now split three ways. The Fourth, Fifth, and Eleventh Circuits have held that courts should grant a full EAJA award unless the United States's entire position was "substantially justified." The Ninth Circuit has chosen to allocate an EAJA award where the United States was partially justified. (This approach also finds support in a recent unpublished opinion from the Fourth Circuit.) The Seventh Circuit's decision here charts a third course, holding that courts may deny an award outright, even where the position of the United States is concededly not justified on one or more issues, if a court finds that the United States's position on what the court deems to be the "more prominent" issue was justified. On this question, too, this Court's guidance is urgently needed.

3. Finally, on both issues, this case offers a good opportunity to provide much-needed clarity. Asylum proceedings number in the thousands every year, and the question of attorney's fees comes up frequently. The EAJA's proper interpretation is especially important in this area because it offers an incentive for attorneys to take up just causes on behalf of those who frequently have no means to pay for legal counsel.

For any of these reasons, the Court should grant this petition for certiorari.

I. THE SEVENTH CIRCUIT'S HOLDING THAT THE "POSITION OF THE UNITED STATES" IN IMMIGRATION CASES DOES NOT INCLUDE THE DECISION OF THE IJ IS IN CONFLICT WITH OTHER CIRCUITS, AND CANNOT BE SQUARED WITH THE EAJA'S PLAIN LANGUAGE, ITS LEGISLATIVE HISTORY, OR THIS COURT'S PRECEDENTS.

The Seventh Circuit first erred by excluding from its analysis of whether to award EAJA fees issues resolved by the IJ. Specifically, while the Seventh Circuit disagreed with three determinations made by the agency in this immigration case, it held that because one of them (whether Mr. Gatimi was subject to past persecution) was decided incorrectly only by the IJ, and not the BIA, it could not support an award of EAJA fees because it was not the "position of the United States." Instead, the court reasoned, the IJ's decision on this issue---even though "absurd" and "inconsistent"—was merely "a stumble on the way to the formulation of that position," a "mistake of

a subordinate agency official," and "not an adequate basis for an award of fees." Pet. App. 38a.

This decision is troubling. The BIA did not anywhere "reject" the IJ's finding regarding past persecution, but simply failed to address it at all. And when the BIA's decision merely supplements the IJ's, "the IJ's opinion, as supplemented by the BIA's opinion becomes the basis for review." *E.g.*, *Liu v. Ashcroft*, 380 F.3d 307, 311 (7th Cir. 2004). So the IJ's "absurd" view regarding past persecution was certainly before the Seventh Circuit. The Gatimis' counsel, for example, could hardly ignore the issue in briefing before the Seventh Circuit, lest the Gatimis fail to address a potentially dispositive argument against them. Had the BIA "rejected" the IJ's "absurd" view, the Seventh Circuit would have been limited to reviewing the decision of the BIA, and the Gatimis would not have had to brief the issue. But that is not what happened. The court was therefore remiss in holding that the BIA's failure to address the issue somehow placed the IJ's work beyond the scope of the EAJA.

The Seventh Circuit's approach cannot be reconciled with the text of the statute, this Court's precedents, or relevant legislative history. As to the text, in 1985, Congress amended the EAJA, adding the following definition of what constitutes the "position of the United States":

> "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not

> be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

Pub. L. 99-80, 99 Stat. 185, § 2(c)(2)(B), 28 U. S. C. § 2412(d)(2)(D). As this Court has recognized, by deliberately employing the singular term "position," Congress unmistakably intended that the analysis of what the "position of the United States" was in a matter involve "only one threshold determination for the entire civil action." *Jean*, 496 U.S. at 159.

The legislative history of the 1985 amendments supports this view. The House Report issued with the 1985 EAJA Amendment states definitively that the EAJA was designed to "provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then [tries] to avoid such liability by reasonable behavior during the litigation." H.R. Rep. No. 99-120 (pt. 1), at 11 *reprinted in* 1985 U.S.C.C.A.N. 132, 140. The report thus confirmed that the position of the United States

> includes actions and omissions of an agency which formed the basis of the adversary adjudication. An omission which may be relevant includes the failure of an agency *or its staff* to act based on a statutory, regulatory, or constitutional duty.

Id. (emphasis added). Even more specifically, the report made clear that this includes the action of both "any agency" and "*any official of the United States acting in his or her official capacity.*" *Id.* at 12; 1985 U.S.C.C.A.N. at 141 (emphasis added). Thus, while the Seventh Circuit dismissed the work of the IJ in

this case as a "mistake of a subordinate agency official," Pet. App. 38a, the legislative history confirms that Congress intended such mistakes to be included as part of the "position of the United States." This is also eminently reasonable as a policy matter. IJs should not be permitted to give immigrants the run-around, forcing the expenditure of resources by these usually impoverished individuals, knowing that the immigrants will never recover those expenditures so long as the BIA does not expressly adopt as its own the IJs' work before it gets to a federal court of appeals.

Thus, perhaps not surprisingly, the Seventh Circuit's approach cannot be squared with that of other circuits, which have hewed more closely to the text, legislative history, and precedent. In particular, the Ninth Circuit has made clear that, for purposes of analysis of an EAJA claim, "the BIA *and IJ* decisions we review are as much the 'position of the United States' as is the [government's] litigation position" before a court of appeals. *Thangaraja*, 428 F.3d at 873 (emphasis added). All three—the IJs, the BIA, and the Department of Homeland Security (the litigating agency)—are part of the executive branch. *See id.* at 874. Accordingly, the Ninth Circuit has held that "the 'position of the United States' as defined by EAJA encompasses" not only the government's "litigation position" in the court of appeals, but also "the underlying agency decision rendered by the BIA *or an IJ*, as the manner in which responsibilities are divided within the executive branch is immaterial to determining what the statutory language requires." *Id.* (emphasis added).

The Seventh Circuit's approach is also in tension with that of the Second, Third, Fifth, and Tenth Circuits, all of which have held more generally that underlying agency misconduct must be included in the "position of the United States." *See Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992) ("[T]he underlying misconduct giving rise to the suit must be also evaluated."); *Johnson v. Gonzales*, 416 F.3d 205, 210 (3d Cir. 2005) ("[T]he Government must meet the substantially justified test twice—once with regard to the underlying agency action and again with regard to its litigation position in the proceedings arising from that action."); *Vacchio v. Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005); *Hackett v. Barnhart*, 475 F.3d 1166, 1174 (10th Cir. 2007) (explaining that EAJA fees generally should be awarded where the government's underlying action was unreasonable even if the government advanced a reasonable litigation position).

This tangled mess requires this Court's intervention. The Court should grant certiorari to clarify that an IJ's work constitutes part of the "position of the United States" for purposes of the EAJA.

II. THE SEVENTH CIRCUIT'S APPROACH TO WHETHER THE POSITION OF THE UNITED STATES WAS "SUBSTANTIALLY JUSTIFIED" EXACERBATES A NOW DEEP AND INTRACTABLE CIRCUIT SPLIT.

The Seventh Circuit's opinion also exacerbates what was, even before this opinion, a well-entrenched circuit split as to what to do when a court concludes that the position of the United States was "substantially justified" as to less than all of the

issues litigated. This circuit split, too, requires this Court's intervention.

Before the Seventh Circuit's decision in this case, two principal positions had prevailed. Because, as this Court has recognized, a "lawsuit cannot be viewed as a series of discrete claims," *Hensely*, 461 U.S. at 435, the Fourth, Fifth, and Eleventh Circuits correctly held that where the position of the United States was only justified as to one of several issues presented, a court should grant a full EAJA award. In *Russell v. National Mediation Board*, 775 F. 2d 1284 (5th Cir. 1985), the Fifth Circuit explained that the legislative changes to the EAJA enacted in 1985 compelled an award for the entire amount of fees and costs unless the losing party was substantially justified in *all* of its litigation positions:

> [W]hen Congress meant to apportion fees, it did so explicitly . . . . Cases under the old EAJA holding that fees may be apportioned when the government's litigation position is substantially justified as to some claims but not others are inapposite here. . . . The language and legislative history of Pub. L. No. 99-80 make clear that the new EAJA is designed to enable those oppressed by unreasonable government action to vindicate their rights without having to worry about attorney fees. Were we to accept the Board's argument, we would defeat that purpose in cases such as this, where a large portion of the successful attorney's time is spent dealing with the litigation

> position. We hold that in computing Russell's attorney fees on remand, the district court should consider the time spent presenting the entire case on the merits, not just the time spent contesting the government's underlying action.

Id. at 1291-92.

A year later, the Eleventh Circuit reached the same conclusion in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986). In that case, the court held that the government was justified in some aspects of the litigation, but not in other issues that "involved the same factual bases" and were "intertwined with the remaining legal theories." Accordingly, the court ruled that "the attorneys should be fully compensated for their work on the case as a whole." *Id.*

And the Fourth Circuit has also held that, even if one minor issue lacked substantial justification, a court should try to determine the effect that error had on the entire litigation:

> [A] more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's "position" in the entire case as unreasonable, whereas a totally insupportable and clearly unreasonable position by the government on an *inconsequential* aspect of the litigation might not. Similarly, a broader government position that, considered in a vacuum, would not be clearly egregious might still, in the overall

> context of the case, constitute an unreasonable position because of its impact. Although an unreasonable stance taken on a single issue may thus undermine the substantial justification of the government's position, that question can be answered only by looking to the stance's effect on the entire civil action.

Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993) (emphasis added). Various district courts, too, have embraced this approach. *See, e.g., Wedra v. Thomas*, 623 F. Supp. 272, 276 (S.D.N.Y 1985) (claims on which plaintiff was unsuccessful shared "a common core of facts" with its successful claims); *CEMS, Inc. v. United States*, 65 Fed. Cl. 473, 478 (2005) ("[T]he United States cannot escape responsibility for paying EAJA fees unless all its claims were substantially justified.").

Even if the work of the IJ cannot be considered as part of the position of the United States, this majority view would compel a full EAJA award in the instant case. The Seventh Circuit correctly held that the agency's position was not substantially justified as to one of two issues the BIA decided and the Seventh Circuit reversed: Mrs. Gatimi's fear of FGM. Had the agency not taken its unjustified position, the Gatimis would have been granted asylum and would not have had to litigate any of the issues raised here. The agency's unjustified position was thus the "but for" cause of the instant litigation, and the statute therefore requires an award of their fees and costs to the Gatimis, who prevailed in this litigation.

On the other hand, the Ninth Circuit has held that an EAJA award should be allocated when the position of the United States is only partially "substantially justified." In *United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996), the court held that "[t]here may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the *unjustified portion* of the conduct." (Emphasis added.) Since then, that court has followed *Rubin* twice, each time allocating an EAJA award. *See United States v. Dolorosa Street*, 190 F.3d 977 (9th Cir. 1997); *Hernandez-Aquino v. Ashcroft*, 48 F. App'x 240 (9th Cir. 2002) (unpublished opinion). After the Seventh Circuit's decision in this case, the Fourth Circuit also issued an unpublished decision that allocated an EAJA award. *Nken v. Holder*, 2010 WL 2640255 (4th Cir. June 24, 2010) (per curiam); *see id.* at *2 n.2 (distinguishing *Gatimi II*).[1]

These were the two sides of the circuit split facing the Seventh Circuit. But it joined neither one, preferring instead to carve out a third approach: the wholesale denial of an EAJA award if the position of the United States was "substantially justified" as to at least one of the issues presented, so long as that issue was (in the court's view) "more prominent" than

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[1] Numerous courts allocated such awards before the 1985 amendments. *E.g.*, *Cinciarelli v. Reagan*, 729 F.2d 801, 804-05 (D.C. Cir. 1984); *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983); *see also Ellis v. United States*, 711 F.2d 1571, 1576 (Fed. Cir. 1983) (favoring allocation when the government was partially justified). But we know of no other circuit to have done so since then.

the others. Pet. App. 43a.[2] This approach is inconsistent with this Court's decision in *Hensley*, which warned the "lawsuit cannot be viewed as a series of discrete claims" as the Seventh Circuit did here. 461 U.S. at 435. And worse, it deepens what was already an entrenched split of authority in the Courts of Appeals. For these reasons, too, the Court should grant certiorari.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ADDRESS BOTH OF THESE DISPUTED EAJA-RELATED ISSUES, FREQUENTLY RECURRING AND IMPORTANT TO THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY'S IMMIGRATION COURTS.

Finally, this case presents a unique opportunity to take up both the related questions of what counts as the "position of the United States" in an immigration matter, and how to analyze whether that position was "substantially justified." The issues were fully vetted with the Court of Appeals and also briefed in an *en banc* petition (which was denied). And their correct resolution is crucially important to the

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[2] The Seventh Circuit initially did not address allocation because the Gatimis did not ask for it, requesting a full award instead. *See* Pet. App. 43a-44a. But the Gatimis did not have to ask the court to allocate the EAJA award because the majority view supported, and still supports, awarding EAJA fees in full. After *Gatimi II*, when it became clear that the Seventh Circuit would not follow the majority view, the Gatimis promptly asked for an allocation in their *en banc* petition, which was denied. Thus, the Gatimis put the allocation issue before the Seventh Circuit at the earliest practicable time.

administration of the justice system for individuals seeking relief in immigration courts in this country.

Resolving the questions presented in this petition is likely to affect thousands of immigration proceedings every year. According to the Department of Homeland Security's data, during the 2009 fiscal year over 10,000 people were granted defensive asylum (*i.e.*, asylum asserted before an IJ as defense against removal). *See* Department of Homeland Security, Office of Immigration Statistics, "2009 Yearbook of Immigration Statistics" 43 (Aug. 2010), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf (last visited Oct. 1, 2010). And although the Department's data does not reveal how many people applied for defensive asylum during immigration court proceedings, independent studies indicate that immigration courts deny more than half of defensive applications. *See* TRACImmigration, "Immigration Judges," http://trac.syr.edu/immigration/reports/160/ (last visited Oct. 1, 2010). A conservative estimate thus suggests that at least 20,000 asylum applications are resolved each year in immigration courts. Indeed, in the decade between 1994 and 2005, IJs "disposed of 'on their merits' somewhere between 25,000 and 35,000 requests each year." *Id.*

For asylum applicants, who are frequently unable to afford an attorney, being represented by counsel often means the difference between staying in the United States or forcible repatriation to a country where they face persecution (or worse). According to one exhaustive study, "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case." Jaya Ramji-

Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007). Represented petitioners are almost three times as likely (45.6% as opposed to 16.3%) to receive asylum. *See id.* But while immigrants in removal proceedings have a right to obtain legal counsel, unlike in criminal proceedings that right is only guaranteed if counsel is procured "at no expense to the Government." 8 U.S.C. § 1362. Nearly a third of asylum applicants proceed without counsel. *See* Ramji-Nogales, *supra*, at 325.

To bridge the gap between those fortunate enough to be able to afford an attorney and those who must fend for themselves, the EAJA offers a fee-shifting incentive for attorneys to take up just causes. For this incentive to work well, attorneys eligible for fees and costs under the EAJA must be able to recover them from the government. This petition thus offers an excellent vehicle for resolving multiple circuit splits in an area where clarity can impact thousands of administrative and judicial proceedings every year.

CONCLUSION

For all these reasons, the petition should be granted.

Respectfully submitted,

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OCTOBER 8, 2010

Counsel for Petitioners

APPENDIX

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

Files A 96 495 092/093/094

September 17, 2007

In the Matters of
FRANCIS GATIMI,
JANE GATIMI,
COLLINS GATIMI
Respondents

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a) (1) (B) through 101(a) (15) of the Act — Remained longer in the United States than permitted.
APPLICATIONS: Political asylum, withholding and protection under the Torture Convention.

ON BEHALF OF RESPONDENT: Jonathan Willmoth, Esquire

ON BEHALF OF DEPARTMENT: Jennifer May, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents consist of a family. The principals in this case is the male respondent, Francis Gatimi (hereinafter he will be referred to as the male respondent, which simply is the respondent, since he is the principal). He was born on November 27th, 1966 in Nairobi, Kenya. The female respondent is named Jane Gatimi. She was born on March 25th,

1999 also in Kenya. The respondents have two children. The minor respondent in this case is named Collins, who was born on July 14th, 1995 in Kenya.

The allegations against each of the respondents in this case have been admitted. They fully acknowledge that they are not citizens of the United States, that they are natives and citizens of Kenya. That they were admitted with visitor's visa and that they overstayed their visitor's visa without permission remaining beyond the authorized term. I find, therefore, that the charge they violated their visa has been sustained by their admissions. I find each of the respondents removable as charged.

The respondents are seeking political asylum, withholding and protection under the Torture Convention. Applicants may qualify for political asylum based on either past persecution or a well-founded fear of persecution. In this case, the respondents are claiming persecution because of membership in a particular social group. The burden of proof to establish claim is on the respondents.

THE EVIDENCE

Male Respondent's Testimony

The male respondent testified that he was born in November of 1966 in Kenya. That he is a member of the Kikuyu ethnic group. He testified that he studied software engineering. That he also earned his income in Kenya from operating two taxis. That he also added to his income by raising crops.

More importantly, he testified that he was a member of the Mungiki sect, a quasi-religious group that consisted principally, although not exclusively of Kikuyus. He testified he was a member from 1995 to

1999. On cross-examination, he added that there were no membership cards for this organization. That he did pay dues to the group, or did pay a certain amount of money each month to the group from 1995 to 1999. He described that as being $150 a month, equivalent to about 10,000 shillings or about 60 shillings to the dollar.

He further testified that the Mungiki were active in Nairobi slum areas, but not exclusively in that area, that they were also active in other parts of the country. He testified that his wife first came to the United States in December 1999 and that he came to the United States in May of 2001 and stayed until August of 2001 when he returned to Kenya. He planned to return to Kenya because he believed that the government was trying to eliminate the Mungiki.

However, respondent testified that after his return in August of 2001, he was kidnapped and then "tortured" by the Mungiki. He claims that they beat him around his knees, and they "squeezed his private parts." They released him only when he promised to bring his wife back to them. Of course, he did not.

In March 2002, Mr. Gatimi returned to the United States. He claims that if he were forcibly repatriated to Kenya, he would be killed by the Mungiki. He felt the government would be powerless to protect him, and would be unwilling to protect him. The Court asked the respondent whether the Mungiki had been outlawed by Kenya. He admitted that the Mungiki had been outlawed, he claimed in 2002, rather than 2004. He was also asked whether the police, as indicated in the State Department's Country Report, see page 6, had not tried to "arrest or crackdown on members of the Mungiki." He said that the

government just arrested, but then released Mungiki members and he would not describe their activities, that is the police activities, as a crackdown. Finally, he was asked whether, in view of his concerns about the threat to his wife of being circumcised (that is FGM) would not the government's banning of the practice reassure him. He acknowledged that the Government had banned the practice of FGM in Kenya. He also admitted that it had actually criminalized the practice for children under 17 years of age, imposing a one year jail term and a fine of 50,000 shillings against the practitioners of this mutilation. He also agreed that with the State Department's Country Report that there are approximately 32 percent of Kenyan women who had been circumcised and that further FGM occurs principally in young girls in that country.

The Female Respondent's Testimony

The female respondent testified that she was born in 1968 and that she has two children, Collins and Irene, the latter a United States citizen, both living with her. She testified that she first came to the United States in December 1999. She claimed that she came here then because the Mungiki had invaded her home twice. That she returned to Kenya in April of 2000 and had a car accident. She claimed that the car accident was caused by the Mungiki and that they were trying to attack her. This is the contention in the male and female's statement. However, on cross-examination she did not know who hit her car and did not know whether they were connected to the Mungiki.

She described her return to the United States, in March of 2001. She claimed she was pregnant at the

time and needed medical attention and she was scared that prior to her return in March of 2001 she has been moving from one place to another because she was afraid of the Mungiki. She also admitted that she did not have the intention of staying permanently when she returned in March of 2001. That she was admitted as a visitor and it was only later after the incident involving her husband's mistreatment that she decided that she was going to stay permanently in the United States. She opined in the end of her testimony that she fears that she would be circumcised if forcibly returned to Kenya, or if she refused she would be killed. On cross-examination, she admitted she hadn't been harmed physically by the Mungiki in Kenya and that she still had a family there consisting of a number of siblings who have not been mistreated, and she also admitted that she believes the police did make reports when she and her husband complained about the Mungiki's mistreatment, but doesn't have copies of those reports.

First, the Department has conducted an arrest for security clearance and has cleared both of the respondents for asylum and any other discretionary related reliefs.

As far as the documents, I reviewed the documents that the respondent submitted, specifically the affidavits which are included in Exhibit 4. I have also reviewed the attachments relating to the activities of the Mungiki in Kenya which the respondent has submitted, but I will not describe them specifically in my decision, but the decision is informed their contents.

In addition, I have reviewed the documents that the Department of Homeland Security has presented, the Country Report on Human Rights Practices for Kenya for 2006, background notes, and CIA World Fact Book. See Exhibit 3.

The respondent's contention in this case is that he has suffered past persecution by the Mungiki, a sect, and that the persecution consists of their kidnapping and "torturing of them", and the threats they had made against his wife to circumcise her if she returned. He further contends the government and its agents such as the police in Kenya are unable to unwilling to protect him. That the group continues to terrorize areas in Kenya, and the government has proved that it is unable to stop it because of the widespread violence which is the result of the Mungiki's activities and which has occurred despite the group being outlawed.

The respondent also contends that the Mungiki had issued ultimatums against all women to be circumcised or FGM'd. In this case, in addition, it involves one in which the Mungiki has specifically threatened the respondent's wife, Ms. Gatimi, with being circumcised.

The respondent contends that he and his family are members "former members of the Mungiki" and he contends that this is a group which has an immutable characteristic which they cannot change. That is, that is, that they were once members of that organization called the Mungiki and that they cannot change that unless they rejoin it. The past persecution was based on that membership, and moreover, that they had a fear or at least a reasonable fear of future mistreatment from the

Mungiki against them because Ms. Gatimi, the female respondent is opposed to female circumcision which is advocated by the Mungiki.

ANALYSIS

The first point of my analysis will be directed to the Department of Homeland Security's position that the respondents are barred from asylum because they assisted in the persecution of others. The Department contends that the respondent, that is the male respondent, is a persecutor, because he contributed $150 a month to the Mungiki and that he must have known what the Mungiki were doing, that they were a criminal enterprise and thus he is actually a part of the organization which is persecuting others and therefore did not claim protection in the United States.

I disagree with this contention for a number of reasons. The respondent in this case, I am referring to the male respondent, claimed that he left the organization in 1999 after being associated with it for four years. He explained that he was beaten and mistreated because he refused to continue his activities. It is the contention that the money contribution to an organization over a number of months is that sufficient to be assisting in the persecution of others. I do not agree that, that would be sufficient to assist in the persecution of others. The giving of money, this amount of money, a relatively small amount of money, is not sufficient to say that the respondent was personally accountable for every act by the Mungiki, the group which has been described as a sect by some, or a movement by others, but not the political party. The Department further contends that the respondent could move to

different part of Kenya and relocate and whatever the threat to him, the option of relocating would exist so that he could avoid mistreatment. I don't believe that it has been shown either that the respondent could relocate. I don't believe it has been shown that the respondent could relocate in this case, insofar as he has testified that the Mungiki had representation in may different part of Kenya, that is not a contention that has been rebutted by any information. I think that the credible statement in that regard, in that the Mungiki have representation in most parts of the country undermines the mere assertion by the Department that he can relocate.

However, there are more fundamental problems with the respondent's case than the Department has brought forward. First, there is the problem of the basis of the claim. That is that the respondent is facing persecution because he is a former member of the Mungiki and that this is an immutable characteristic. I disagree that this constitutes a particular social group the way that the respondent has defined this group. In recent decision, In re A-M-E-and J-G-U-, Int. Dec. 3550 (BIA January 31st, 2007). The Board has concluded that a proposed group must be more than a mere description of the applicant's background, but must have a shared characteristic with a requisite "social disability" and must be considered in the context of the country of concern, and the persecution described. There has been no showing here that there are or is recognized in Kenya to be a group of former members of the Mungiki in that country. That there is any organization that is recognized as such, or any group that any part of society has designated as former members of the Mungiki. Therefore, I do not believe

that the respondent has established a ground on which his claim can be predicated.

Turning to the question of persecution, the respondent claims that he was tortured. He describes mistreatment as being kidnapped and being beaten on the knees and squeezed in his private parts. However, he described that after his release, he never went to any hospital and he never received any medical care. The term torture connotes a degree of harm which would be significant. The acts described against the respondents by the Mungiki certainly are reprehensible. However, the respondent has in cross-examination testified that he never sought any medical care and he didn't have to be hospitalized. I do not conclude that the respondent has described mistreatment which rises to the level of "past persecution". That is, mistreatment which is significant in and of itself, which would qualify an alien for political asylum.

However, such mistreatment can be considered as indicative of a reasonable possibility of persecution. The respondent claims that the mistreatment that he experienced, in Kenya, indicates that that could happen to him again or something worse, and that his wife would be genitally mutilated upon her return to Kenya. They contend that the government is unable or unwilling to protect them from the predations of the Mungiki.

The respondents characterization of third party harm is reflected in the case law in the McMullen v. INS, 165 F.2d, 1312 (9th Cir. 1981) case in which the court defined "persecution as that which may be inflicted by either the government or by persons or organization which the government is unable or

unwilling to control. The respondent readily concedes that the Kenyan government does not condone the activities of the Mungiki. In fact it is has outlawed them and has arrested them. Rather, the respondent contends that the government is either unable or unwilling to control the activities of the Mungiki. Since the parties agree that the government does not explicitly condone the activities of the Mungiki by a policy, then has it shown that it is completely helpless to protect the victims. That is the standard which the Seventh Circuit has advocated in Roman v. INS, 233 F.3d 1027 (7th Cir. 2000). Namely, in the Court's view in that case, "an applicant must show that the government condones the conduct or at least demonstrates a complete helplessness to protect the victims. In contrast then, if the government is taking reasonable steps to oppose the conduct, that is the predations of the Mungiki, then that contention is in effect rebutted. In this case, I find that the Kenyan government has shown a willingness to take reasonable steps to oppose the conduct of the Mungiki. It has banned the organization. The State Department report clearly states that it has invested substantial number of Mungiki members and it has cracked down on the organization as an illegal one. The respondent has not shown that the government of Kenya is completely helpless to protect the victims of the Mungiki.

The respondent counters that the government, in this case that is the police, inability to protect them is indicated by the fact that the Mungiki continue to operate despite the government crackdowns. However, I do not agree with this assertion. First, the existence of the Mungiki activities does not show

that the police are ineffective. It just shows that the police are unwilling to control the persecutors, it simply shows that the problem is a deep-seeded social problem, not that the police are ineffective. In this case, the police took reports, there are reports from the State Department that that had arrested Mungiki and have tried to crackdown on it. There is no indication that the police are simply ignoring the problem or tolerating it. If there were evidence in this case, specifically documentary evidence, showing that persecution by the Mungiki is condoned or tolerated by the government, then that would be sufficient to show that the government was unwilling to control the persecution. But there is no such evidence in this case. In contrast, in Matter of O-Z- and I-Z-, Int. Dec. 3346 (BIA 1988), the Board found that the Ukrainian government was unwilling to control anti-semitic activities where the local police refused three times to investigate evidence credibly shown that anti-Semitic organization were targeting Ukrainians of Jewish ethnicity. There is no such showing here. The government did take action in fact to prepare reports when the respondent complained and they have taken action on a national basis to control the Mungiki. I therefore find that it has not been shown in this case that as a factual matter that the Kenyan government is unable or unwilling to control the actions of the Mungiki. In summary, I have concluded that the respondent has not shown past persecution nor a well-founded fear of persecution or a basis on which to predicate such a claim. I therefore am denying political asylum as I will deny withholding of removal finding that the burden of proof even higher for withholding requirement and a realistic likelihood of persecution

has not been met and that there has been no showing whatsoever that the government of Kenya will torture the respondents upon their return.

The Court is well aware that the respondents present the case which has humanitarian characteristics. They claim that their presence in the United States is on account of what happened to them in Kenya, to wit, the actions by the Mungiki against them. In deciding whether their claim is credible, I face the complex task. I do not find that some of the reasons they have given for their trips to the United States are completely credible. Specifically, I don't find that their presence in the United States is directly the result of their relationship or their contact with the Mungiki, because of the number of trips that they made between the U.S. and Kenya. Those people who were actually afraid of a threat, in the country, i.e., Kenya, would not have returned of their own volition. I don't find that the respondent's excuses or explanations are credible in that regard. As far as the rest of the claim, the testimony about the respondent's background and his membership in the Mungiki, his statements under oath that he was accused, and his description of the abuse, I find that to be credible. As far as the female's respondent's claim that she is afraid to Kenya because of fear of female genital mutilation, while that contention may be sincerely subjectively expressed, I don't find that as toward country conditions; that is, it has an objective basis.

The remaining relief is voluntary departure. I note that all of the respondents are eligible and I have granted voluntary departure and set a bond of $1,000 for each of the respondents. I believe that this is

consistent with the flight risk in the event that this order will become final. I note that the respondents were physically present in the United States for a period of 365 days and are not barred from this relief. Finally, I will designate Kenya, since the respondents have declined to designate a country of removal. Accordingly, the following orders are entered:

ORDERS

IT IS ORDERED that the respondent's application for political asylum, withholding and protection under the Torture convention be denied.

IT IS FURTHER ORDERED that the respondents be granted voluntary departure without expense to the government provided they depart on or before November 19th, 2007.

IT IS FURTHER ORDERED that the respondents post individually a $1,000 departure bond (a total of $3,000) within five business days of presenting a valid passport within 60 days of this order. If the respondents do not comply, the following order shall take effect, and it shall be ordered that they be removed to Kenya.

CRAIG M. ZERBE
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

Files A 96 495 092/093/094 (Chicago, IL)

August 4, 2008

In re

FRANCIS GATIMI,
JANE WAIRIMU
GATIMI, COLLINS
WAMUHIU GATIMI

IN REMOVAL
PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Jonathan Willmoth, Esquire

ON BEHALF OF DHS: Jennifer A. May, Assistant Chief Counsel

CHARGE:

Notice: 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(I)(B)] — In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondents, a husband, wife, and son from Kenya, appeal from the Immigration Judge's September 17, 2007, decision. In that decision, the Immigration Judge denied the lead respondent's applications for asylum under section 208 of the

Immigration and Nationality Act, 8 U .S.C. § 1158, and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as protection under the Convention Against Torture.[1] The Department of Homeland Security (the "DHS") filed a response to the lead respondent's appeal[2] and the lead respondent filed a reply to the DHS's response. During the pendency of the lead respondent's appeal, the lead respondent also filed a motion to remand based on changed country conditions and the DHS filed an opposition to the lead respondent's motion. The appeal will be dismissed and the lead respondent's motion will be denied.

On appeal, the lead respondent argues that the Immigration Judge erred in finding that he failed to meet his burden of proof. Specifically, the lead respondent contends that he established past persecution and a well-founded fear and clear probability of persecution in Kenya by members of Mungiki, a quasi-religious group, on account of his political opinion and membership in a particular social group, consisting of former members of Mungiki. The lead respondent further contends that the Immigration Judge erred in finding that the he

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[1] We note that respondents Jane Wairimu Gatimi (A096 495 093) and Collins Wamuhiu Gatimi (A096 495094) were derivatives of the lead respondent's application for asylum.

[2] To the extent that the DHS argues in the response to the lead respondent's appeal that the lead respondent is ineligible for asylum because he was a persecutor of others, we note that the Immigration Judge found that the lead respondent was not a persecutor of others and the DHS did not file a notice of appeal from the Immigration Judge's September 17, 2007, decision (I.J. at 8-9).

failed to establish his eligibility for protection under the Convention Against Torture.

In his motion to remand, the lead respondent argues that proceedings should be remanded to the Immigration Judge based on changed country conditions in Kenya following the country's December 27,2007, presidential election. Specifically, the lead respondent contends that the Kenyan Government has begun colluding with Mungiki following the recent presidential election. The lead respondent also contends that Kikuyus have been targeted for persecution following the recent presidential election and thus he is newly entitled to relief as a member of the Kikuyu tribe.

Turning first to the lead respondent's appeal, we find that the lead respondent failed to meet his burden of proof for asylum, even if he established that his past harm amounts to persecution. Specifically, we find that the lead respondent failed to establish that former members of Mungiki constitute a "particular social group" within the meaning of the definition of "refugee" set forth at section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). A "particular social group" is defined by "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." See Matter of Kasinga, 21 I&N Dec. 357, 366 (BIA 1996), Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); see also Lwin v. INS, 144 F.3d 505 (7th Cir. 1998). In recent years, the Board has issued a line of cases reaffirming the "particular social group"

formula set forth in Matter of Acosta, supra, and providing further clarification regarding its proper application. See Matter of A-T-, 24 I&N Dec. 296 (BIA 2007) (indicating that young Bambara women who oppose arranged marriage were not a particular social group); Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74-75 (BIA 2007) (holding that "affluent Guatemalans" did not constitute a particular social group); Matter of C-A-, 23 I&N Dec. 951,959-61 (BIA 2006) (finding that noncriminal informants working against the Cali drug cartel in Colombia were not a particular social group). In each of these cases, we emphasized that the purported group's social visibility—i.e., the extent to which members of a society perceive those with the characteristic in question as members of a social group—is of particular importance in determining whether an alien is a member of a claimed particular social group. See, e.g., Matter of C-A-, supra, at 951 (indicating that "[t]he social visibility of the members of a claimed social group is an important consideration in identifying the existence of a 'particular social group' for the purpose of determining whether a person qualifies as a refugee").

In this case, we agree with the Immigration Judge that the lead respondent's former Mungiki membership lacks the requisite social visibility to establish that he is a member of a "particular social group" (I.J. at 9-10). Matter of C-A-, supra. Specifically, the lead respondent has not established that persons who are former members of Mungiki are part of a socially visible group within Kenyan society. Moreover, in this regard, the lead respondent does not allege that he possesses any characteristics that

would cause others in Kenyan society to recognize him as a former member of Mungiki. Of course, individuals who refuse to rejoin Mungiki may face risks from Mungiki. But, such risks would arise from the individualized reaction of Mungiki to the specific behavior of the person who is no longer a member. There is no showing that membership in a larger body of persons resistant to Mungiki is of concern to anyone in Kenya or that such individuals are seen as a segment of the population in any meaningful respect.

To the extent that the lead respondent argues that he fears persecution on account of political opinion based on his former membership in Mungiki, we find that the lead respondent's decision to no longer be a member of Mungiki, without more, does not constitute a "political opinion," nor would any harm befalling the lead respondent as a result of such decision normally be found to be motivated by a political opinion. See INS v. Elias-Zacarias, 502 U.S. 478 (1992) (finding that a victim of forced recruitment must show that he is being persecuted on account of his political opinion and that the persecution is not solely the result of the guerrillas' interest in recruiting). Furthermore, to the extent that the lead respondent fears that his wife will be subjected to female genital mutilation upon her return to Kenya, we find that he failed to present sufficient testimonial or documentary evidence to establish that a reasonable person would fear persecution in Kenya on this basis (I.J. at 14; Exh. 3). See also Matter of A-K-, 24 I&N Dec. 275 (BIA 2007). Because we find that the lead respondent failed to establish his eligibility for asylum for the abovementioned reasons, we need not address the

Immigration Judge's additional finding that the lead respondent failed to establish that the Kenyan Government is unable or unwilling to protect him from Mungiki or the lead respondent's related arguments on appeal (I.J. at 11-13). Additionally, to the extent that the Immigration Judge found that the lead respondent's and his wife's testimony regarding their previous trips to the United States was not credible, we need not address this finding because we find that the lead respondent is ineligible for asylum. for the abovementioned reasons without regard to the issue of credibility (I.J. at 14).

Inasmuch as the lead respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of removal. See Matter of Mogharrabi, supra. We also find that the lead respondent has failed to establish a likelihood that he will be tortured if he returns to Kenya (I.J. at 13). See 8 C.F.R. § 1208.16(c)(2).

Turning next to the lead respondent's motion to remand, we find that remand of proceedings is not warranted. In support of his motion, the lead respondent has submitted numerous news articles regarding conditions in Kenya following the December 27,2007, presidential election. Although many of these news articles suggest that the Kenyan Government has been colluding with Mungiki following the recent presidential election, we find that the lead respondent has not established how this evidence would change the outcome of these proceedings (Exhs. A-D, R, S). See Matter of Coelho, 20 I&N Dec. 464 (BIA 1992) (holding that an alien

seeking to reopen proceedings bears a heavy burden of proving that the new evidence offered would likely change the result of the alien's case). Even if the Kenyan Government has been colluding with Mungiki, the lead respondent is nonetheless ineligible for relief because he failed to establish persecution on account of a protected ground. Moreover, to the extent that the lead respondent argues that he is newly entitled to relief because the evidence reveals that Kikuyus are being persecuted following the recent election, we reject this claim. Although the evidence reveals that there have been incidents of violence against Kikuyus, the violence appears to be located primarily in the Rift Valley of Kenya, which bears no relation to the lead respondent who is from Nairobi (Exhs. P, Q, T).

Accordingly, the following orders will be entered:

ORDER: The appeal is dismissed.

FURTHER ORDER: The lead respondent's motion to remand is denied.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondents are permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). See section 240B(b) of the Immigration and Nationality Act; 8 U.S.C. § 1229c(b); see also 8 C.F.R. §§ 1240.26(c), (f). In the event the respondents fail to voluntarily depart the United States, the respondents shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondents fail to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondents shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

ROGER PAULEY
FOR THE BOARD

United States Court of Appeals, Seventh Circuit.

Francis GATIMI, et al., Petitioners,

v.

Eric H. HOLDER, Jr., Attorney General of the United States, Respondent.

No. 08-3197
August 20, 2009

Before POSNER, RIPPLE, and WOOD, Circuit Judges.

POSNER, Circuit Judge.

The Board of Immigration Appeals denied the asylum application of Francis Gatimi, a Kenyan, and the applications of his wife and daughter, which are derivative from his. The Board also denied a motion to remand the matter to the immigration judge for further consideration based on changed conditions in Kenya since the original application for asylum, but we have no jurisdiction to review that order: 8 U.S.C. § 1158(a)(3) bars judicial review of rulings by the Board that there are no changed circumstances materially affecting an application for asylum. *See Khan v. Filip*, 554 F.3d 681, 687 (7th Cir. 2009). And 8 U.S.C. § 1252(a)(2)(B)(ii), as interpreted in *Kucana v. Mukasey*, 533 F.3d 534, 536-37 (7th Cir. 2008), cert. granted, 129 S. Ct. 2075 (2009), bars judicial review of discretionary decisions of the Board, thus including motions to reconsider, *see* 8 C.F.R. §§ 1003.2(a), (b)(1), which was the nature of Gatimi's motion to remand.

Gatimi is a member of the Kikuyu tribe, which dominates Kenyan politics. In 1995 he joined a Kikuyu group called the Mungiki (the Kikuyu word for "multitude"). The group has obscure political aims and idiosyncratic religious observances, which may be a cover for extortion and other financially motivated criminal acts. United Nations Human Rights Council, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Mission to Kenya" ¶ 8 (A/HRC/11/2/Add.6, May 26, 2009), www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf (visited July 20, 2009—as were all the online sources cited in this opinion); U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, "2008 Human Rights Report: Kenya" (Feb. 25, 2009), www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm.

The group is much given to violence. *In re D-I-M-*, 24 I. & N. Dec. 448, 448-49 (BIA 2008); United Nations Human Rights Council, "Statement by Professor Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions," (June 3, 2009), www.un.org/webcast/unhrc/11th/statements/Alston_STMT.pdf; Hearing on the Immediate and Underlying Causes and Consequences of Kenya's Flawed Election before the Senate Committee on Foreign Relations, Subcommittee on African Affairs, 110th Cong., 2d Sess. (Feb 7, 2008) (testimony of Chris Albin-Lackey on behalf of Human Rights Watch), foreign.senate.gov/testimony/2008/AlbinLackeyTestimony080207a.pdf. Defectors from the group are at particular risk of violence. Immigration and Refugee Board of Canada, "Kenya: The *Mungiki* Sect;

Leadership, Membership and Recruitment, Organizational Structure, Activities and State Protection Available to Its Victims (2006-October 2007)" (Nov. 1, 2007), www.unhcr.org/refworld/docid/4784def81e.html; Cyrus Kinyungu, "Murdered: Sect Members Who Said No," *The Nation (Nairobi)*, June 19, 2004.

The group also compels women, including wives of members and of defectors, to undergo clitoridectomy and excision. The Kenyan government has outlawed the group and these practices. But there is a serious question, as the sources we have cited explain, whether it is able or even willing to protect people targeted by the group, such as defectors, or to prevent such practices, which are common in Kenya as in much of sub-Saharan Africa. U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, "2008 Human Rights Report: Kenya" (Feb. 25, 2009), www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm; U.S. Dep't of State, Office of the Senior Coordinator for International Women's Issues, "Report on Female Genital Mutilation" 7, 9, 38-39 (Feb. 1, 2001), www.state.gov/documents/organization/9424.pdf.

Mr. Gatimi defected from the Mungiki in 1999, and shortly afterward a group of Mungiki broke into his home, looking for him, and when they could not find him killed his servant. He called the police, but they refused to help or protect him. A month later the Mungiki returned to his home, looking for his wife, whom they wanted to circumcise. They did not find her. She then fled to the United States with her newborn child.

The Mungiki returned to Gatimi's home, killed the family pets, burned two vehicles, and threatened to

gouge out his eyes. Again he complained to the police, and this time they assured him they would protect him. On the strength of this assurance his wife came back to Kenya—but within a week the Mungiki told Gatimi that unless he produced his wife within two weeks for circumcision he would be killed. She went into hiding and in 2001 returned to the United States, followed shortly by Gatimi.

He returned to Kenya a few months later, having heard that conditions had improved. He was wrong. The Mungiki kidnapped and tortured him, releasing him only after he promised to produce his wife for circumcision. He left Kenya and joined his wife in the United States and applied for asylum.

The immigration judge ruled that the acts committed by the Mungiki against Gatimi were not persecution but merely "mistreatment." That is absurd. With regard to Mrs. Gatimi's claim to face persecution in the form of female genital mutilation, a recognized ground of asylum, the immigration judge lapsed into incoherence. The following is his entire discussion of the claim: "As far as the female respondent's claim that she is afraid to [return to] Kenya because of fear of female genital mutilation, while that contention may be sincerely subjectively expressed, I don't find that as toward country conditions; that is, it has an objective basis." He also ruled that Gatimi had not shown that the Kenyan police were helpless to protect him from the Mungiki, and that in any event defectors from the Mungiki do not constitute a "particular social group."

The Board did not reach the question whether Gatimi had been persecuted, but affirmed the immigration judge on the basis that defectors from

the Mungiki are not a particular social group and that as far as Mrs. Gatimi's fear of female circumcision was concerned Gatimi had "failed to present sufficient testimonial or documentary evidence to establish that a reasonable person would fear persecution in Kenya on this basis."

Persecution is a ground for asylum only if motivated by "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The immigration statute does not define "particular social group," but the Board has defined it as a group whose members share "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (BIA 1996); *see also Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *In re Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985), *overruled on other grounds by In re Magharrabi*, 19 I. & N. Dec. 439 (BIA 1987). So far, so good; if the "members" have no common characteristics they can't constitute a group, and if they can change those characteristics—that is, cease to belong to the group—without significant hardship, they should be required to do so rather than be allowed to resettle in America if they do not meet the ordinary criteria for immigration to this country.

Sepulveda v. Gonzales, 464 F.3d 770, 771-72 (7th Cir. 2006) (citations omitted), gives examples of qualifying groups: "the educated, landowning class of cattle farmers targeted by Colombian rebels, Christian women in Iran who oppose the Islamic dress code for women, parents of Burmese student

dissidents, and children who escaped after being enslaved from Ugandan guerillas who had enslaved them." *Sepulveda* holds that former subordinates of the attorney general of Colombia who had information about the insurgents plaguing that nation were also a "particular social group." They had been targeted for assassination by the insurgents, and many had been assassinated. While an employee could resign from the attorney general's office, he could not resign from a group defined as former employees of the office; once a former employee, always a former employee (unless one is reemployed by one's former employer). *See also Koudriachova v. Gonzales*, 490 F.3d 255, 262-63 (2d Cir. 2007) (former KGB agents); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (former members of the police or military); *In re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (former member of the national police).

We cannot see how this case can be distinguished from *Sepulveda*, which the Board did not cite. Instead the Board cited cases which hold that a group must have "social visibility" to be a "particular social group," meaning that "members of a society perceive those with the characteristic in question as members of a social group." The Board said there was no evidence that Gatimi "possesses any characteristics that would cause others in Kenyan society to recognize him as a former member of Mungiki . . . . There is no showing that membership in a larger body of persons resistant to Mungiki is of concern to anyone in Kenya or that such individuals are seen as a segment of the population in any meaningful respect."

This formula cannot be squared with *Sepulveda*. More important, it makes no sense; nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population." Those former employees of the Colombian attorney general tried hard, one can be sure, to become invisible and, so far as appears, were unknown to Colombian society as a whole.

We are mindful of the Supreme Court's admonition to the courts of appeals, in *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam), that the Board's definition of "particular social group" is entitled to deference. The issue in that case was whether a family could be a particular social group, a difficult issue on which the Board had not opined; and the Court held that the Board should have an opportunity to do so. But regarding "social visibility" as a criterion for determining "particular social group," the Board has been inconsistent rather than silent. It has found groups to be "particular social groups" without reference to social visibility, *In re Kasinga*, *supra*, 21 I. & N. Dec. at 365-66 (young women of a tribe that practices female genital mutilation but who have not been subjected to it); *In*

re Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (BIA 1990) (homosexuals); *In re Fuentes*, *supra*, 19 I. & N. Dec. at 662 (former members of the national police); *cf. In re Acosta*, *supra*, 19 I. & N. Dec. at 233-34 (former military leaders or land owners), as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases. When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate. *AT&T Inc. v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006); *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002). Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities.

It is true that our sister circuits have generally approved "social visibility" as a criterion for determining whether an asylum seeker was persecuted for belonging to a particular social group. We have no quarrel with the rejection in those cases of the attempted classification of specific groups as particular social groups. *See Ramos-Lopez v. Holder*, 563 F.3d 855, 859-61 (9th Cir. 2009) (young Honduran men who resist being recruited into gangs); *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009) (Brazilians who inform on drug smugglers); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628-29 (8th Cir. 2008) (competing Guatemalan owners of family businesses); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72-73 (2d Cir. 2007) (per curiam) (affluent Guatemalans); *Castillo-Arias v. United States Attorney General*, 446 F.3d 1190,

1194-95, 1197 (11th Cir. 2006) (informants on the Colombian drug cartel). We just don't see what work "social visibility" does; the candidate groups flunked the basic "social group" test, quoted earlier, declared in cases like *Lwin*, *Kasinga*, and *Acosta* (where the test originated).

The Board's position in this case, however, is of a piece with another position that we have rejected: that a person cannot complain of religious persecution if by concealing his religious practice he escapes the persecutors' notice. *Oyekunle v. Gonzales*, 498 F.3d 715, 717 (7th Cir. 2007); *Iao v. Gonzales*, 400 F.3d 530, 532 (7th Cir. 2005); *Muhur v. Ashcroft*, 355 F.3d 958, 960-61 (7th Cir. 2004). The only way, on the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend "I am a Mungiki defector." The government's brief states flatly that secrecy disqualifies a group from being deemed a particular social group.

The Board has a legitimate interest in resisting efforts to classify people who are targets of persecution as members of a particular social group when they have little or nothing in common beyond being targets. One example is a group defined as the set of people who cooperate with the police and by doing so expose themselves to persecution by the criminals whom they have informed on, as in the *Scatambuli* and *Castillo-Arias* cases cited earlier. Another example is debtors of the same creditor, as in *Cruz Funez v. Gonzales*, 406 F.3d 1187, 1191-92 (10th Cir. 2005). But like the lawyers in the *Sepulveda* case, the defectors from the Mungiki

constitute a group with as much coherence as children of the bourgeoisie, or of the aristocracy, had in the Soviet Union: breakaway factions that were relentlessly persecuted.

A further question, however, is whether the Kenyan government is either complicit in the Mungiki's persecution of defectors from the group or helpless to protect them from the Mungiki. If neither is the case, Mr. Gatimi is not entitled to asylum. But if the government either is complicit in the persecution by the private group or simply can't protect a former member of the group from being persecuted—in other words—if the government is "unable or unwilling to protect him against the private parties," *Garcia v. Gonzales*, 500 F.3d 615, 618 (7th Cir. 2007)—then the claim to asylum can go forward. *Youkhana v. Gonzales*, 460 F.3d 927, 932 (7th Cir. 2006); *Hor v. Gonzales*, 421 F.3d 497, 502 (7th Cir. 2005); *Korablina v. INS*, 158 F.3d 1038, 1044-45 (9th Cir. 1998).

The evidence of the Kenyan government's complicity in the actions of the Mungiki is compelling, yet was ignored by the Board. *See* Juma Kwayera, "Gang Infiltrates Kenya Police," *Mail & Guardian Online*, Feb. 5, 2008 ("growing fears" that the Kenyan police force has been "infiltrated by the outlawed pro-government Mungiki sect"); David McGuffin, "Kenya Spirals into Tribal Anarchy," *CBC News*, Jan. 31, 2008; "Ethnic Violence Intensifies in Ravaged Kenya," *TV3*, Jan. 31, 2008 ("Mungiki is the unofficial arm of the government"); Thilo Thielke, "Some Kill with Machetes, Others with Arrows," *Spiegel Online*, Jan. 28, 2008 (the Mungiki are "acting in collusion with the government");

Immigration and Refugee Board of Canada, *supra*. The Board's ruling that defectors from the Mungiki do not constitute a particular social group made this evidence irrelevant.

We turn to Mrs. Gatimi's claim. The Board's lawyer, going beyond anything in either the immigration judge's opinion or the Board's opinion, argues that because Mrs. Gatimi's claim of asylum is derivative from her husband's, and because she did not file a claim for asylum within the one-year statutory deadline, 8 U.S.C. § 1158(a)(2)(B), the only basis on which she can obtain asylum is persecution of her husband. But there are two senses in which one person's claim of asylum can be derivative from another's. The first, and much the more common, is that the person is a spouse or child of the primary asylum seeker. 8 U.S.C. § 1158(b)(3)(A); *Miljkovic v. Ashcroft*, 366 F.3d 580, 581-82 (7th Cir. 2004). There is no need to show that the spouse or child faces persecution.

The second form of derivative claim, which is also present in this case, is that if the spouse (or other derivative claimant) is sent back with the primary asylum seeker (Mr. Gatimi, in this case) to their country of origin, she will be subjected to harms that constitute persecution of him. (This is to be distinguished from cases in which the persecution of your relative is evidence that the persecutor is gunning for you as well. *See Nyonzele v. INS*, 83 F.3d 975, 983 (8th Cir. 1996); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991).) If your house is burned down, or your child killed, in order to harm you, the fact that you are not touched does not mean that those acts cannot constitute persecution of you.

Abay v. Ashcroft, 368 F.3d 634, 640-42 (6th Cir. 2004); *In re A-K-*, 24 I. & N. Dec. 275, 278 (BIA 2007); *Tchoukhrova v. Gonzales* 430 F.3d 1222, 1225 n. 2 (9th Cir. 2005) (dissent from denial of rehearing en banc); *but see Mame Fatou Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007). Genital mutilation of one's wife, unless one happens to be a supporter of the practice, is a way to punish one, and so the menace to Mrs. Gatimi is a legitimate component of Mr. Gatimi's case. To send her back to Kenya to face female genital mutilation would be to enable persecution of him.

Furthermore, a derivative claimant can advance reasons independent of those of the primary claimant for why she should not be deported. (There is one definite, and one arguable, exception. *See Yu v. U.S. Attorney General*, 568 F.3d 1328, 1332-33 (11th Cir. 2009) (threat of forced sterilization of derivative claimant spouse cannot support primary claimant's application); *Lin-Zheng v. Attorney General*, 557 F.3d 147, 155-57 (3d Cir. 2009) (en banc) (same); *Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 304-14 (2d Cir. 2007) (en banc) (same); *Tchoukhrova v. Gonzales*, *supra*, 430 F.3d at 1223 (persecution of derivative claimant child cannot support primary claimant's application); *contra*, *Abay v. Ashcroft*, *supra*, 368 F.3d at 640-42. Neither exception is applicable to this case.) The Board said there was no evidence that Mrs. Gatimi will be subjected to female genital mutilation if she is returned to Kenya. In fact the only evidence in the record is to the contrary; it is that the Mungiki will track her down and subject her to the procedure and the Kenyan police will not interfere. Besides the affidavits to this effect in the record, *see VM v. Secretary of State for the Home*

Department (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG [2008] UKAIT 00049, ¶¶ 150, 242 (United Kingdom Asylum and Immigration Tribunal 2008); Paul Harris, "Mau Mau Returns to Kenya," *Sydney Morning Herald*, Jan. 17, 2000.

Although she did not file a primary claim of asylum (that is, a claim for asylum based on persecution of her) within the one-year deadline for filing such claims, there is no basis in statute, regulation, or case law for imposing that deadline on a derivative claimant merely because she seeks to bolster her claim by evidence that she too is faced with a threat of persecution. When Mrs. Gatimi first arrived in the United States, her husband was still in Kenya without, so far as appears, intending to seek asylum in the United States, and so she had no reason to seek asylum; she expected to return to Kenya, and did. The grounds that she would have had for seeking asylum within one year of her arrival in the United States became relevant to her situation only much later, when her husband sought asylum.

The order to remove the petitioners from the United States is vacated and the matter is remanded to the Board of Immigration Appeals for further proceedings consistent with this opinion.

VACATED AND REMANDED.

United States Court of Appeals, Seventh Circuit.

Francis GATIMI, et al., Petitioners,

v.

Eric H. HOLDER, Jr., Attorney General of the United States, Respondent.

No. 08-3197

May 17, 2010

Before POSNER, RIPPLE, and WOOD, Circuit Judges.

On Motion for an Award of Attorneys' Fees and Costs

POSNER, Circuit Judge.

In a previous opinion we granted the petition for review filed by Francis Gatimi and his wife and daughter and remanded the case to the Board of Immigration Appeals. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). The Gatimis now seek an award of attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), which directs a court to award a prevailing party in a litigation with the United States, "including proceedings for judicial review of agency action," his attorneys' fees and other expenses "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.*; *see Potdar v. Holder*, 585 F.3d 317, 319 (7th Cir. 2009). "The case must have sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive

fashion." *United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 381-82 (7th Cir. 2010).

We reversed the Board of Immigration Appeals on both issues presented by the petition for review: we rejected the Board's ruling that the petitioners had to show that their "social group" was "socially visible" and we held that Mrs. Gatimi's fear of female genital mutilation was supported by the record and relevant to the asylum claim. The petitioners point to the "strong language" in our opinion, *see Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004), to our characterization of the immigration judge's determination that Mr. Gatimi did not suffer persecution as "absurd," and to our statement that the immigration judge's position on Mrs. Gatimi's fear of female genital mutilation "lapsed into incoherence."

Until today we've found it unnecessary to decide whether in immigration cases the "position of the United States" as that phrase is used in the Equal Access to Justice Act denotes only the position taken by the government in judicial review proceedings or whether it also includes the underlying decision by the agency-namely the Board of Immigration Appeals—of which judicial review is sought. *Kholyavskiy v. Holder*, 561 F.3d 689, 691 n. 3 (7th Cir. 2009); *Potdar v. Holder*, *supra*, 585 F.3d at 319 n. 1; *Tchemkou v. Mukasey*, 517 F.3d 506, 509 n. 1 (7th Cir. 2008). The issue is inescapable in this case.

Each of the three courts of appeals to have considered the question has held that the position of the United States does include the Board's decision. *Thangaraja v. Gonzales*, 428 F.3d 870, 873-74 (9th Cir. 2005); *Kiareldeen v. Ashcroft*, 273 F.3d 542, 545

(3d Cir. 2001); *Barwari v. Mukasey*, 282 Fed.Appx. 896, 897-98 (2d Cir. 2008) (per curiam). (Only the first two decisions are precedential, however.) The Act itself says that the "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D); *see Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994); *Cummings v. Sullivan*, 950 F.2d 492, 497 (7th Cir. 1991); *Hardisty v. Astrue*, 592 F.3d 1072, 1076-77 (9th Cir. 2010); *Hackett v. Barnhart*, 475 F.3d 1166, 1170 (10th Cir. 2007); *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C.Cir. 2004); *McDonald v. Secretary of HHS*, 884 F.2d 1468, 1475-76 (1st Cir. 1989). The *Chenery* doctrine binds the government's lawyers in judicial review proceedings to the grounds of the agency's decision, *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S.Ct. 454, 87 L.Ed. 626 (1943); *Parker v. Astrue*, 597 F.3d 920, 922 (7th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009), so that unless they confess error on the agency any lack of substantial justification in the grounds they advance is due to the agency; the agency, not the appellate lawyers, thus determines the "position of the United States." (Nor do the government lawyers argue otherwise.) Neither in this regard, nor in any other that occurs to us, is there any difference between immigration cases and other agency cases.

The Board affirmed the immigration judge's holding that defectors from Mungiki, the group in which Mr. Gatimi claimed membership, were not a "particular social group" for asylum purposes, because of the group's lack of "social visibility." The

immigration judge had further held that Mr. Gatimi had not proved persecution-that his kidnapping and torture were merely mistreatment. That was the ruling we had called "absurd." But the Board had not affirmed it and the government's lawyer did not rely on it in this court; and the mistake of a subordinate agency official is not automatically the "position of the United States." Of course "fees may be awarded in cases where the government's prelitigation conduct was not substantially justified even though its litigating position may have been substantially justified and vice versa." *Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994). The fact that the government has a substantially justified basis for arguing that the agency's decision was substantially justified doesn't make the agency's decision substantially justified. *Hackett v. Barnhart*, *supra*, 475 F.3d at 1174; *Thangaraja v. Gonzales*, *supra*, 428 F.3d at 875-76 n. 1 (9th Cir. 2005). (This result is implicit in the Supreme Court's decision in *Commissioner v. Jean*, discussed later in this opinion.)

But that is not this case. The Board wasn't defending an untenable ruling by the immigration judge, but rejecting it. The immigration judge's ruling was only an element of the overall position of the United States—more precisely perhaps, a stumble on the way to the formulation of that position-because the Board and the government's lawyer rejected it. It is not an adequate basis for an award of fees.

We rejected the Board's use of "social visibility" to determine membership in a social group because it was inconsistent with the Board's basic test for a

social group, and with our decisions. But although we thus rejected the government's position on that issue, it was, we think, substantially justified. "[U]ncertainty in the law arising from conflicting authority or the novelty of the question weighs in the government's favor when analyzing the reasonableness of the government's litigation position." *Kholyavskiy v. Holder*, *supra*, 561 F.3d at 691, quoting *Marcus v. Shalala*, *supra*, 17 F.3d at 1037. We hadn't previously addressed the Board's use of the social-visibility criterion for membership in a social group. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir.2001), holds sensibly that if the government's position is unreasonable an award of fees cannot be withheld even if the case is novel; the fact that a legal question has never arisen before doesn't mean that it must be a question to which reasonable people could give different answers. Maybe the question didn't arise because the answer was obvious. But our opinion in this case acknowledged that five other circuits had approved the social-visibility criterion, and that brings this case within the scope of cases such as *Krecioch v. United States*, 316 F.3d 684, 689 (7th Cir.2003), which found the government's position substantially justified in part because it was "supported by precedent from other federal circuits." *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 676-77 (D.C.Cir.2007); *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1178, (D.C.Cir.2005); *Koch v. Dept. of Interior*, 47 F.3d 1015, 1021 (10th Cir.1995); *Younger v. Secretary of HHS*, 910 F.2d 319, 321 (6th Cir.1990) (per curiam).

The immigration judge dismissed as lacking an objective basis Mrs. Gatimi's fears of being subjected

to female genital mutilation if returned to Kenya. The government's lawyer in this court went further, arguing that because Mrs. Gatimi had not applied for asylum herself the only basis on which she could obtain asylum was persecution of her husband. We rejected each variant of the government's position. The immigration judge's discussion of the claim had "lapsed into incoherence." 578 F.3d at 614. And contrary to the Board's statement in affirming the immigration judge that there was no evidence to support the claim, we cited evidence that the "Mungiki will track Mrs. Gatimi down and subject her to the procedure and that the Kenyan police will not interfere." *Id.* at 618.

We explained that persecution of Mrs. Gatimi can constitute persecution of Mr. Gatimi, and so her fear of persecution is relevant to his (and therefore their) claim for asylum. "Genital mutilation of one's wife, unless one happens to be a supporter of the practice, is a way to punish one, and so the menace to Mrs. Gatimi is a legitimate component of Mr. Gatimi's case." *Id.* at 617. The government relied on cases holding that a petitioner is not eligible for asylum because of fear of her child's being subjected to female genital mutilation upon removal. *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609, 616 (7th Cir. 2003); *In re A-K-*, 24 I. & N. Dec. 275, 277 (BIA 2007). But in those cases the children had one parent with legal status and so were not subject to removal. Mrs. Gatimi was subject to removal with Mr. Gatimi, so there was no possibility of her remaining in the United States and thus avoiding the risk of being subjected to female genital mutilation. The government had no legal or

factual support for its position at any level of the proceedings.

Thus of the two issues in this case the government's position was substantially justified with respect to only one. Although we can imagine trying to allocate fees across issues in such a case, we can't find a case in which that's been done. The cases just ask whether the government's position was substantially justified as a whole, *Potdar v. Holder*, *supra*, 585 F.3d at 325-26; *Al-Harbi v. INS*, 284 F.3d 1080, 1085 (9th Cir. 2002) (per curiam); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139-40 (4th Cir. 1993), and if it is they deny any award of fees. The provision authorizing the district court, "in its discretion," to "reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. § 2412(d)(1)(C), presupposes an entitlement to some award of fees under the Act, and the question in this case is whether there is such an entitlement.

The Supreme Court said in *Commissioner v. Jean*, 496 U.S. 154, 161-62, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990), that "while the parties' postures on individual matters may be more or less justified, the EAJA-like other fee-shifting statutes-favors treating a case as an inclusive whole, rather than as atomized line-items." This statement has persuaded a number of courts that "substantial justification" (except in cases in which the party seeking fees "engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy") is

all or nothing: no fee can be awarded even though the government imposed needless expense on its opponent by making meritless arguments, provided that its position as a whole was substantially justified. *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003); *Gutierrez v. Barnhart*, *supra*, 274 F.3d at 1258-59; *Roanoke River Basin Ass'n v. Hudson*, *supra*, 991 F.2d at 139. Yet the issue in *Commissioner v. Jean* was not allocation; it was whether the government could resist an award on the ground that although its position in the underlying case had not been substantially justified, its opposition to the application for fees had been substantially justified; the Court rejected this defense. As we said earlier, the fact that there is a substantial justification for arguing that the government's position was substantially justified doesn't make that position substantially justified. A criminal lawyer may be substantially justified in pressing an appeal for his client, rather than filing an Anders brief and by doing so acknowledging that there is no nonfrivolous ground for appeal; but that doesn't mean his client is innocent.

United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996), says that in cases under the Equal Access to Justice Act "there may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the unjustified portion of the conduct " (emphasis added). Such adjustments are of course the norm under other fee-shifting statutes, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and the Supreme Court in *Commissioner v. Jean* relied on *Hensley* and other cases under fee-shifting statutes other than the

Equal Access to Justice Act for help in interpreting that Act. 496 U.S. at 161-62, 110 S.Ct. 2316.

It is perilous to take judicial language out of context. *Commissioner v. Jean* does not address the question whether allocation is permissible under the Equal Access to Justice Act, thus allowing an award of fees for the part of the government's case that was not substantially justified. The question merits further consideration. It is not obvious that if the government loses after advancing two good grounds and one bad one its opponent should get nothing but if the government loses after advancing one good ground and two bad ones its opponent should get 100 percent of the fees he incurred (provided they were reasonable in amount and he hadn't unduly protracted the litigation). Against this it can be argued that to attempt such an allocation would be cutting things too fine and would be in tension with the rule that waivers of sovereign immunity should be narrowly construed. E.g., *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 96 L.Ed. 26 (1951).

This is not the case in which to try to resolve the issue. The Gatimis are not asking for an allocation. They want all or nothing. The social-visibility issue was the more prominent issue and the government's position on that issue was substantially justified, and we therefore conclude that the government's position was substantially justified as a whole, and on that basis we deny the motion for attorneys' fees.

The petitioners' request for an award of costs, to which we now turn, was untimely. Rule 39(d)(1) of the Federal Rules of Appellate Procedure provides that "a party who wants costs taxed must-within 14

days after entry of judgment-file with the circuit clerk, with proof of service, an itemized and verified bill of costs." The petitioners ask us to treat "entry of judgment" in Rule 39 as the Equal Access to Justice Act treats "final judgment": a motion for attorney's fees must be filed "within thirty days of final judgment," defined as a judgment "that is final and not appealable." 28 U.S.C. § 2412(d)(1)(B), (d)(2)(G). But "entry of judgment" is not the same thing as "final judgment." Rule 36 says that "a judgment is entered when it is noted on the docket." Fed. R.App. P. 36(a). The judgment in this appeal was entered on August 20; the petitioners' motion for costs was filed 92 days later.

Nor have the petitioners shown "good cause" for our extending the deadline. Fed. R.App. P. 26(b). They say their tardiness was due not to dilatory conduct but to a reasonable belief that judgment had not been entered. The belief was not reasonable. Rule 36 is explicit that "judgment is entered when it is noted on the docket."

The motion for attorneys' fees and costs is DENIED.

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

July 12, 2010

Before

Richard A. Posner, Circuit Judge
Kenneth F. Ripple, Circuit Judge
Diane P. Wood, Circuit Judge

No. 08-3197

FRANCIS GATIMI, et al., Petitioners	Petition to Review an Order of the Board of Immigration Appeals.
v.	Nos. A96-495-092 to -094
ERIC H. HOLDER, JR., Attorney General of the United States, Respondent.	On Motion for an Award of Attorneys' Fees and Costs.

O R D E R

On June 28, 2010, petitioners filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore DENIED.

181

(2)

No. 10-497

In the Supreme Court of the United States

FRANCIS GATIMI, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412, authorizes courts in certain contexts to award attorney's fees and other expenses to the prevailing party in a civil action brought by or against the United States if the court determines that the "position of the United States" was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). The term "position of the United States" is defined as "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). The questions presented are as follows:

1. Whether the "position of the United States" includes one portion of the rationale of an order by an immigration judge, where the prevailing party filed its civil action for judicial review of a subsequent order of the Board of Immigration Appeals that did not adopt that portion of the immigration judge's rationale.

2. Whether a court must conclude that the position of the United States was not "substantially justified" if it finds that the government's position was not justified with respect to only one issue in the litigation, even if the court concludes that the government's position regarding the more prominent issue in the case was substantially justified.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Ardestani v. *INS*, 502 U.S. 129 (1991) 3
Commissioner, INS v. *Jean*, 496 U.S. 154 (1990) 3, 4, 9, 13
De Leon-Ochoa v. *Attorney Gen.*, 622 F.3d 341 (3d Cir. 2010) 11
Haitian Refugee Ctr. v. *Meese*, 791 F.2d 1489, vacated in part, 804 F.2d 1573 (11th Cir. 1986) 15
Halim v. *Holder*, 590 F.3d 971 (9th Cir. 2009) 12
Hebron v. *Touhy*, 18 F.3d 421 (7th Cir. 1994) 17
Hosseini v. *Gonzales*, 471 F.3d 953 (9th Cir. 2006) 11
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 18
INS v. *Ventura*, 537 U.S. 12 (2002) 10, 11
Indiana Gas Co., v. *Home Ins. Co.*, 141 F.3d 314 (7th Cir.), cert. denied, 525 U.S. 931 (1998) 17
Kone v. *Holder*, 620 F.3d 760 (7th Cir. 2010) 11
Long v. *Holder*, 620 F.3d 162 (2d Cir. 2010) 11
Pierce v. *Underwood*, 487 U.S. 552 (1988) 3, 12
Roanoke River Basin Ass'n v. *Hudson*, 991 F.2d 132 (4th Cir.), cert. denied, 510 U.S. 864 (1993) 14, 15

Cases—Continued: Page

Russell v. *National Mediation Bd.*, 775 F.2d 1284 (5th Cir. 1985) 14
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 11
Sepulveda v. *Gonzales*, 464 F.3d 770 (7th Cir. 2006) 6
Thangaraja v. *Gonzales*, 428 F.3d 870 (9th Cir. 2005) 11, 12
Todorovic v. *U.S. Attorney Gen.*, 621 F.3d 1318 (11th Cir. 2010) 11
United States v. *Jones*, 125 F.3d 1418 (11th Cir. 1997) ... 15
United States v. *Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977 (9th Cir. 1999) 16
United States v. *Rubin*, 97 F.3d 373 (9th Cir. 1996) 16

Statutes and regulations:

Equal Access to Justice Act, Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 3
5 U.S.C. 504 3
28 U.S.C. 2412(d) 7
28 U.S.C. 2412(d)(1)(A) 3, 7
28 U.S.C. 2412(d)(2)(D) 3, 10
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 6
8 U.S.C. 1101(a)(42) 17
8 U.S.C. 1101(a)(42)(A) 4
8 U.S.C. 1101(a)(47)(B)(i) 2
8 U.S.C. 1101(a)(47)(B)(ii) 2
8 U.S.C. 1158(b)(1)(B) 4
8 U.S.C. 1158(b)(3)(A) 4, 18

Statutes and regulations—Continued: Page

8 U.S.C. 1158(c)(1) 4
8 U.S.C. 1229(a) 2
8 U.S.C. 1229a(a) 2
8 U.S.C. 1229a(c)(1)(A) 2
8 U.S.C. 1229a(e)(2) 2
8 U.S.C. 1252(a)(1) 2
8 U.S.C. 1252(a)(5) 2
8 U.S.C. 1252(b)(2) 2
8 U.S.C. 1252(b)(4)(B) 18
8 U.S.C. 1252(b)(9) 2
8 U.S.C. 1252(d)(1) 2
8 U.S.C. 1252(g) 2
8 C.F.R.:
Pt. 239:
Section 239.1 2
Pt. 1003:
Section 1003.1(a)(1) 2
Section 1003.1(b) 2
Section 1003.1(d)(1)(ii) 2
Section 1003.1(d)(3) 2
Section 1003.1(d)(7) 2
Section 1003.1(h) 2
Section 1003.3 2
Section 1003.10 2
Section 1003.14 2
Section 1003.39 2

Regulations—Continued: Page

Pt. 1208:

Section 1208.21 ..... 4, 18

Pt. 1240:

Section 1240.12 2

Section 1240.12(c) 2

Section 1240.14 2

Section 1240.15 2

Miscellaneous:

H.R. Rep. No. 120, 99th Cong., 1st Sess. (1985) 10

In the Supreme Court of the United States

No. 10-497

FRANCIS GATIMI, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 35a-44a) denying an award of attorney's fees is reported at 606 F.3d 344.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2010. A petition for rehearing was denied on July 12, 2010 (Pet. App. 45a). The petition for a writ of certiorari was filed on October 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Administrative removal proceedings generally involve two levels of agency adjudication within the Department of Justice. First, an official from the Department of Homeland Security initiates removal pro-

ceedings before an immigration judge, who exercises authority delegated by the Attorney General. See 8 U.S.C. 1229(a), 1229a(a); 8 C.F.R. 239.1, 1003.10, 1003.14. After considering the evidence produced during the proceedings, the immigration judge decides whether the alien is removable from the United States. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12; cf. 8 U.S.C. 1229a(e)(2) (defining "removable" to mean inadmissible or deportable). If the immigration judge orders the alien removed, the alien (with exceptions not relevant here) may file an administrative appeal to the Board of Immigration Appeals (Board). See 8 C.F.R. 1003.1(b), 1003.3, 1240.12(c), 1240.15.

If the alien fails to appeal timely to the Board and the Board does not certify the case for its own review, the immigration judge's order of removal becomes final. 8 U.S.C. 1101(a)(47)(B)(ii); 8 C.F.R. 1003.39, 1240.14. Otherwise, the Board exercises its "independent judgment and discretion in considering and determining the case[]" pursuant to the authority delegated to it by the Attorney General. 8 C.F.R. 1003.1(a)(1), (d)(1)(ii) and (3). If the Board affirms (and if the case is not referred to the Attorney General for his further review), the order of removal becomes final upon entry of the Board's decision. 8 U.S.C. 1101(a)(47)(B)(i); 8 C.F.R. 1003.1(d)(7) and (h).

b. An alien may file a civil action for judicial review only from a "final order" of removal, 8 U.S.C. 1252(a)(1) and (b)(9), and only if the "alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1); see 8 U.S.C. 1252(g). Such a petition for review is filed directly in an appropriate court of appeals. 8 U.S.C. 1252(a)(5) and (b)(2).

c. The Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325, as amended, authorizes the court in a civil action brought by or against the United States to award to a "prevailing party" (other than the United States) fees and other expenses incurred by that party if the "position of the United States" was not "substantially justified" and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A). EAJA imposes four eligibility requirements for such an award: (1) the claimant must file an appropriate fee application; (2) the claimant must be a prevailing party; (3) the position of the United States must not be "substantially justified"; and (4) special circumstances must not make an award unjust. *Commissioner, INS* v. *Jean*, 496 U.S. 154, 158 (1990).[1]

With respect to the requirement that the "position of the United States" must not be "substantially justified," 28 U.S.C. 2412(d)(1)(A), EAJA defines the term "position of the United States" to mean "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). In addition, this Court has "held that the term 'substantially justified' means 'justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person.'" *Jean*, 496 U.S. at 158 n.6 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988)). The Court has

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[1] In the immigration context, EAJA authorizes courts to award fees and expenses incurred by the prevailing party only in certain judicial proceedings. It does not allow similar awards for fees and expenses incurred in administrative removal proceedings. See *Ardestani* v. *INS*, 502 U.S. 129, 139 (1991); cf. 5 U.S.C. 504 (EAJA provision authorizing awards of fees and other expenses incurred in certain administrative proceedings).

also explained that "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA * * * favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162. In other words, in determining whether the government's position was "substantially justified" for purposes of an EAJA award, "only one threshold determination for the entire civil action is to be made." *Id.* at 159.

2. a. Petitioners are natives and citizens of Kenya who were admitted to the United States as temporary non-immigrant visitors. Pet. App. 1a-2a. Petitioners did not depart the United States when their visas expired, and they subsequently were placed in removal proceedings. *Id.* at 2a. After removal proceedings had been initiated, petitioners sought the discretionary relief of asylum as a defense to removal based on petitioner Francis Gatimi's claim of refugee status. Cf. 8 U.S.C. 1158(c)(1) (asylum status precludes removal); 8 U.S.C. 1158(b)(3)(A) (spouse and children of an alien may be granted derivative asylum status if the alien "is granted asylum"); 8 C.F.R. 1208.21.

With exceptions not relevant here, an alien qualifies as a "refugee" eligible for asylum if he establishes, *inter alia*, that he was persecuted or has a well-founded fear of persecution "on account of * * * membership in a particular social group." 8 U.S.C. 1101(a)(42)(A), 1158(b)(1)(B). Francis Gatimi's asylum claim (on which the other petitioners' derivative asylum status depended) was based on his contention that he had joined a Kenyan group called the Mungiki and that, after he left that group, he had suffered persecution at the hands of the Mungiki because he was a "former member[] of the Mungiki." Pet. App. 6a, 23a.

b. The immigration judge found petitioners to be removable, denied asylum, and ordered petitioners to be removed. Pet. App. 1a-13a. As relevant here, the immigration judge first concluded that petitioners had not demonstrated eligibility for asylum based on membership in a "particular social group" because the Mungiki did not meet the "social [v]isibility" criteria for such groups reflected in the Board's decisions. *Id.* at 8a. In addition, the judge ruled that the mistreatment that Francis Gatimi had experienced in Kenya was not sufficiently severe to qualify as past "persecution." *Id.* at 9a.

c. The Board affirmed, and it denied petitioners' motion to remand the case to the immigration judge. Pet. App. 14a-21a.

As relevant here, the Board held that, "even if [Francis Gatimi had] established that his past harm amounts to persecution," he nevertheless "failed to meet his burden of proof for asylum" because he "failed to establish that former members of Mungiki constitute a 'particular social group.'" Pet. App. 16a. The Board explained that its prior decisions had "emphasized that the purported group's social visibility—i.e., the extent to which members of a society perceive those with the characteristic in question as members of a social group—is of particular importance" in the analysis. *Id.* at 17a. The Board "agree[d] with the Immigration Judge that [Francis Gatimi's] former Mungiki membership lacks the requisite social visibility to establish that he is a member of a 'particular social group.'" *Ibid.* The Board also explained that, "to the extent that [Francis Gatimi] fears that his wife will be subjected to female genital mutilation upon her return to Kenya," "he failed to present sufficient testimonial or documentary evidence to estab-

lish that a reasonable person [in his position] would fear persecution in Kenya on this basis." *Id.* at 18a.

d. The court of appeals vacated the order of removal and remanded the case for further proceedings. Pet. App. 22a-34a.

The court of appeals first described the factual and procedural background of the case, including the decision of the immigration judge. Pet. App. 22a-25a. In that description, the court characterized as "absurd" the immigration judge's conclusion that Gatimi's mistreatment did not constitute "persecution." *Id.* at 25a. The court of appeals explained, however, that "[t]he Board did not reach the question whether [Francis] Gatimi had been persecuted," and that the Board had instead rested its removal decision on two other grounds: (1) "the Mungiki are not a particular social group" and (2) Francis Gatimi had failed to present sufficient evidence to show that a "reasonable person" in his position would "fear persecution in Kenya" based on his wife's "fear of female circumcision." *Id.* at 25a-26a. The court disagreed with both rulings. *Id.* at 26a-34a.

First, the court of appeals rejected the Board's conclusion that, because the Mungiki did not satisfy the Board's "social visibility" requirement, they did not constitute a "particular social group" within the meaning of the asylum statute. Pet. App. 26a-32a. The court explained that the Board's analysis in this case could not be "squared" with the court of appeals' prior decision in *Sepulveda* v. *Gonzales*, 464 F.3d 770 (7th Cir. 2006), which gave examples of various categories of people that qualify as "particular social group[s]." Pet. App. 26a-28a. The court also found the Board's reasoning to be insufficient, and it declined to defer to the Board's interpretation of the Immigration and Nationality Act be-

cause, in the court's view, the Board's decisions had not been consistent in their "particular social group" analysis. *Id.* at 28a-29a. The court of appeals recognized that its "sister circuits have generally approved 'social visibility' as a criterion for determining whether an asylum seeker was persecuted for belonging to a particular social group," but it explained that, while it did not "quarrel" with the particular holdings of those cases, it declined to adopt their reasoning. *Id.* at 29a-30a.

Second, the court of appeals found Francis Gatimi's asylum claim to be supported by his wife's fear of genital mutilation in Kenya. Pet. App. 32a-34a. The court recognized that Mrs. Gatimi did not file her own timely asylum claim on the basis of that fear. *Id.* at 32a. The court reasoned, however, that the "[g]enital mutilation of one's wife * * * is a way to punish [the husband]," and that "the menace to Mrs. Gatimi" is therefore "a legitimate component of Mr. Gatimi's [asylum] case." *Id.* at 33a. The court concluded that the record evidence supported the contention that Mrs. Gatimi would risk genital mutilation by the Mungiki if she were to return to Kenya, and that the evidence bolstered her claim that "she too is faced with a threat of persecution." *Id.* at 33a-34a.

3. Petitioners subsequently moved for attorney's fees and costs under Section 2412(d) of EAJA, 28 U.S.C. 2412(d). The court of appeals denied the motion. Pet. App. 35a-44a. The court explained that EAJA does not permit an award of attorney's fees and costs if "the court finds that the position of the United States was substantially justified," *id.* at 35a (quoting 28 U.S.C. 2412(d)(1)(A)), and it concluded that the government's position in this case "was substantially justified as a whole," *id.* at 43a.

First, the court of appeals held that the portion of the immigration judge's decision that the court of appeals had labeled as "absurd" is not a part of the "position of the United States." Pet. App. 36a-39a. The court explained that the courts of appeals have viewed the "position of the United States" as including the "Board's decision" in immigration cases, *id.* at 36a-37a, and that the Board here did not adopt the relevant portion of the immigration judge's decision regarding past persecution and instead rested its removal order on other grounds. *Id.* at 37a-38a. The court further observed that "[t]he *Chenery* doctrine binds the government's lawyers in judicial review proceedings to the grounds of the agency's decision," and that both "the Board and the government's lawyer rejected" the pertinent portion of the immigration judge's decision in this case. *Ibid.* For those reasons, the court concluded, the immigration judge's past-persecution ruling was but "a stumble on the way to the formulation" of the position of the United States and "is not an adequate basis for an award of fees." *Id.* at 38a.

Second, the court of appeals held that the government's position was "substantially justified." Pet. App. 38a-43a. The court explained that, although it had disagreed with the government on the first, "more prominent issue" regarding the role of "social visibility" in determining whether the Mungiki are a "particular social group," the government's position in that regard was substantially justified and supported by the decisions of "five other circuits [that] had approved the social-visibility criterion." *Id.* at 38a-39a, 43a. In contrast, the court found that the government's position on the other issue (concerning the relationship of Mrs. Gatimi's fear of persecution to Mr. Gatimi's asylum

claim and the other petitioners' derivative asylum status) was not substantially justified. *Id.* at 40a-41a. The court of appeals noted the possibility that a court might "allocate fees across issues" where the government's position is substantially justified only on some issues. *Id.* at 41a. The court explained, however, that it was aware of no precedent supporting that approach, *ibid.*, and that this case did not provide an appropriate vehicle "to try to resolve the issue" because petitioners "want all or nothing" and did not seek such an "allocation," *id.* at 43a.

The court of appeals further explained that courts of appeals have read EAJA to require an assessment of "whether the government's position was substantially justified as a whole." Pet. App. 41a. The court also noted this Court's statement that EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items," even though particular "postures on individual matters may be more or less justified." *Ibid.* (quoting *Jean*, 496 U.S. at 161-162); see pp. 3-4, *supra*. The court concluded that, because "[t]he social-visibility issue was the more prominent" one in this case and "the government's position on that issue was substantially justified," "the government's position was substantially justified as a whole" and EAJA fees were unwarranted. *Id.* at 43a.

ARGUMENT

Petitioners contend (Pet. 8-12) that the "position of the United States" includes the rationale of an immigration judge, even when the Board does not adopt that reasoning. Petitioners also argue (Pet. 12-17) that the court of appeals erred in finding the position of the United States to be substantially justified. The court of

appeals correctly rejected petitioner's request for EAJA fees, and its decision does not conflict with any decision of this Court or any other circuit. Further review is not warranted.

1. The court of appeals correctly held that the "position of the United States" in an immigration case does not include those portions of an immigration judge's ruling that the Board of Immigration Appeals declines to adopt. Pet. App. 38a. Petitioners' contrary contentions (Pet. 8-12) do not warrant further review.

EAJA defines the term "position of the United States" to include "the action or failure to act by the agency *upon which the civil action is based.*" 28 U.S.C. 2412(d)(2)(D) (emphasis added). That definition makes clear that the "position of the United States" "does not include mere preliminary * * * decisions of the agency which would not be subject to judicial review." H.R. Rep. No. 120, 99th Cong., 1st Sess. 13 (1985). Rather, only "the agency action or failure to act that gave rise to the party's right to bring the action in a federal court" is pertinent. *Ibid.* In the immigration context, because an alien subject to an order of removal must exhaust his administrative remedies by appealing to the Board, the "final" order of removal subject to judicial review is the order of removal *as affirmed by the Board.* See p. 2, *supra.* If the Board does not adopt particular aspects of an immigration judge's decision, those aspects are not part of the agency action "upon which the [alien's subsequent] civil action is based."

That conclusion flows directly from the Court's decision in *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), which held that a court of appeals should not resolve an issue resolved by an immigration judge when the Board concludes that it "need not address" the issue in light of

the Board's other rulings in the case. See *id.* at 13, 15. In such contexts where "[t]he B[oard] has not yet considered [an] issue," the "court of appeals should remand a case to an agency for decision" on the unresolved issue because the entity with delegated authority to speak for the agency has yet to "bring its expertise to bear upon the matter." *Id.* at 16-17; see *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); Pet. App. 37a (discussing the *Chenery* doctrine).

The courts of appeals likewise regularly conclude that the rationale of an immigration judge is not part of the agency action under review unless the Board adopts or otherwise incorporates that reasoning. See, *e.g.*, *De Leon-Ochoa* v. *Attorney Gen.*, 622 F.3d 341, 348 (3d Cir. 2010) ("When the Board issues its own opinion, as here, and does not adopt the [immigration judge]'s findings, we review only the decision of the Board."); *Todorovic* v. *U.S. Attorney Gen.*, 621 F.3d 1318, 1324 (11th Cir. 2010) ("Where the B[oard] issues its own opinion, we review only that opinion, except to the extent that it expressly adopts the immigration judge's reasoning"); *Kone* v. *Holder*, 620 F.3d 760, 763 (7th Cir. 2010) (similar); *Long* v. *Holder*, 620 F.3d 162, 166 (2d Cir. 2010) (similar); *Hosseini* v. *Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006) (similar). Petitioners cite no contrary authority.

Petitioners contend (Pet. 11) that the court of appeals' decision conflicts with the Ninth Circuit's ruling in *Thangaraja* v. *Gonzales*, 428 F.3d 870 (2005). That is incorrect. In *Thangaraja*, the Board "summarily affirmed [the immigration judge's decision] without opin-

ion." *Id.* at 873. When the Board provides no rationale of its own in affirming an order of removal, the courts have treated the reasoning of the immigration judge as the rationale for the agency decision. See, *e.g.*, *Halim* v. *Holder*, 590 F.3d 971, 975 (9th Cir. 2009) ("Where, as here, the B[oard] affirms an [immigration judge]'s decision without an opinion, we review the [immigration judge]'s decision as if it were the B[oard]'s decision."). The court in *Thangaraja* accordingly concluded that, under EAJA, the position of the United States includes "the B[oard] and [immigration judge] decisions *we review*," 428 F.3d at 873 (emphasis added), because the court necessarily reviewed the reasoning of the immigration judge as the only articulated rationale for the agency's action. That reasoning has no application where, as here, the Board issues its own decision for the agency and declines to adopt a particular aspect of the immigration judge's reasoning.[2]

2. The court of appeals also correctly determined that the position of the United States in this case was "substantially justified" under EAJA. Pet. App. 38a-43a. That substantial-justification determination may be overturned only for an abuse of discretion, *Pierce* v. *Underwood*, 487 U.S. 552, 557-563 (1988), and petitioners do not appear to argue that the court of appeals abused its discretion in evaluating the government's

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[2] Petitioners assert (Pet. 12) that the court of appeals' decision is "in tension" with decisions from the Second, Third, Fifth, and Tenth Circuits. No such tension exists. The decisions that petitioners cite do not involve judicial review of final agency decisions that decline to adopt the rationale proffered by a subordinate agency adjudicator, which itself would not be subject to judicial review. In any event, even petitioners do not contend that any tension reflects a division of authority warranting this Court's review.

position as a whole. Instead, petitioners appear to contend (Pet. 12-17) that, as a matter of law, the "position of the United States" can never be "substantially justified" if a court finds that the government's contentions are not substantially justified with respect to even one issue. Petitioners thus contend that an EAJA award is required whenever a court finds substantial justification for "less than all of the issues" in a case. Pet. 12-13. That argument lacks merit and does not warrant further review.

a. In *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), this Court explained that "only one threshold determination for the entire civil action" is made under EAJA's substantial-justification standard. *Id.* at 159; see *id.* at 160 ("The single finding that the Government's position lacks substantial justification * * * operates as a one-time threshold for fee eligibility."). The Court also made clear that, although the litigants' positions "on individual matters may be more or less justified," EAJA's substantial-justification test "favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162. That conclusion follows directly from EAJA's text, which requires a court to determine whether "the position of the United States" was substantially justified, and which repeatedly refers to "the 'position' * * * in the singular." *Id.* at 159. Consistent with *Jean*, the court of appeals in this case correctly framed the relevant question as whether the government's position in the case as a whole was "substantially justified," see Pet. App. 43a, and its fact-bound resolution of that question does not warrant this Court's review.

Petitioners contend (Pet. 13-15) that the Fourth, Fifth, and Eleventh Circuits have required EAJA fees

to be awarded whenever "the position of the United States was only justified as to one of several issues" in a case. The decisions on which petitioners rely do not establish such a rule.

For example, the court in *Russell* v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985), did not (as petitioners contend) hold that EAJA fees must be awarded unless the government "was substantially justified in *all* of its litigation positions." Pet. 13. Rather, the court held that the government's "action was not substantially justified" because it found the key arguments supporting that action to be "playing games * * * with this court" and a "perversion of the truth." 775 F.2d at 1290 (citations omitted). Petitioners quote (Pet. 13-14) from a later section in the court's opinion, which addresses (in apparent dicta) how to calculate the "amount of Russell's fee award" on remand. 775 F.2d at 1291. But that discussion reflects the court's views on how to calculate a reasonable attorney's fee, not whether the government's overall position was "substantially justified." See *id.* at 1291-1292.

The Fourth Circuit's decision in *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, cert. denied, 510 U.S. 864 (1993), likewise does not support petitioners' theory. The court in *Roanoke River* concluded that a court must look to "the totality of circumstances," including "the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them," in order to "determin[e] whether the government's position in a case is substantially justified." *Id.* at 139. The court noted the possibility that "an unreasonable stance taken on a single issue may * * * undermine the substantial justification of the government's position." *Ibid.* The court explained, how-

ever, that the substantial-justification "question can be answered only by looking to the stance's effect on the entire civil action," and it emphasized that "it does not automatically follow that the government's position in the case as a whole is not substantially justified." *Ibid.* Indeed, the court of appeals in *Roanoke River* concluded that the district court had "properly considered the [government's] 'position' in its entirety" and had not abused its discretion in finding the government's "position *in the entire case*" to be substantially justified. *Id.* at 140.

The court in *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, vacated in part, 804 F.2d 1573 (11th Cir. 1986), concluded that EAJA fees were appropriate because the court found it "clear that the INS violated its own regulations and knew that it was violating them," even though the government's position as to other issues was substantially justified. *Id.* at 1499-1500. The court added that the government was "only responsible for 'that portion of the expenses attributable to its unjustified positions,'" but that the "issues were intertwined with the remaining legal theories," making a fully compensatory award appropriate. *Id.* at 1500 (citation omitted).

It is unclear from the Eleventh Circuit's pre-*Jean* opinion in *Haitian Refugee Center* whether the court concluded that the "substantial justification" analysis can be performed on an issue-by-issue basis. But, in any event, that court (after *Jean*) has recognized that the proper analysis must consider "the case as an inclusive whole." *United States* v. *Jones*, 125 F.3d 1418, 1428 (11th Cir. 1997). And, to the extent that *Haitian Refugee Center* may be viewed as analyzing the position of the United States as a whole, nothing in the opinion purports to establish a rule that fees must be awarded

whenever the government's arguments on any issue in the ligation are not substantially justified.

Petitioners contend (Pet. 16) that the Ninth Circuit has held that an EAJA award is required when "the position of the United States is only partially 'substantially justified,'" and that fees should be "allocated" to compensate litigants for the unjustified portion. That is incorrect. In *United States* v. *Rubin*, 97 F.3d 373 (9th Cir. 1996), the court stated in dicta that "[t]here may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the unjustified portion of the conduct." *Id.* at 375. But that statement supports the view that *per se* rules should not govern the analysis. Moreover, the court in *Rubin* emphasized that the case before it did "not present [the] situation" it discussed, and it concluded that the "district court did not abuse its discretion either in treating the case as a whole or in determining that the position of the government was, as a whole, substantially justified." *Id.* at 376. Nothing in *Rubin* supports petitioners' contentions or reflects a division of authority warranting this Court's review.[3]

b. In any event, for two distinct reasons, this case would be a poor vehicle to address the question that petitioners present.

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[3] Petitioners' reliance (Pet. 16) on *United States* v. *Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977 (9th Cir. 1999), is likewise misplaced. The court in *22249 Dolorosa Street* analyzed the justification for the government's position in a forfeiture proceeding that involved only one legal issue: whether the government's forfeiture action was supported by probable cause that the property had been used in illegal drug activity. See *id.* at 982-984. The court awarded fees because it found the government's position on that issue not to be substantially justified. *Id.* at 984.

First, petitioners appear to contend (Pet. 16) that this Court's review is warranted to decide whether "an EAJA award should be allocated" by separating those portions of a case for which a court determines the government's conduct was substantially justified from other portions for which the court determines the conduct was not. But the court of appeals did not pass upon that argument because petitioners did not press it in a timely manner below. Pet. App. 43a; see Pet. 17 n.2 (conceding that the court of appeals "did not address [the] allocation" argument because petitioners "did not ask for it"). And although petitioners assert that they advanced the argument for the first time in their petition for en banc rehearing, *ibid.*, such unresolved arguments raised for the first time at rehearing are forfeited because they come too late. *Indiana Gas Co.* v. *Home Ins. Co.*; 141 F.3d 314, 321 (7th Cir.), cert. denied, 525 U.S. 931 (1998); *Hebron* v. *Touhy*, 18 F.3d 421, 424 (7th Cir. 1994).

Second, the court of appeals' decision (like the second question that petitioners present) proceeds from the premise that the government's position in this case was not substantially justified regarding one of the two issues that the court resolved. Pet. App. 39a-41a. That premise is itself incorrect. The Board was substantially justified in concluding that Francis Gatimi's asylum claim "based on his former membership in Mungiki" was not supported by "sufficient * * * evidence to establish that a reasonable person would fear persecution" because his wife would "be subjected to female genital mutilation upon her return to Kenya." *Id.* at 18a.

In order to establish his own reasonable fear of persecution "on account of"—*i.e.*, caused by—his own "membership in a particular social group," 8 U.S.C.

1101(a)(42), Mr. Gatimi was required to present evidence of "his persecutors' motives." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992). And in order to overturn the Board's decision under the applicable deferential standard, Mr. Gatimi was required to make the further showing that such evidence was "so compelling that no reasonable factfinder could fail to find" a reasonable fear of persecution based on his membership in such a group. *Id.* at 483-484; see 8 U.S.C. 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."). Assuming for present purposes that the genital mutilation of one's wife for the purpose of harming the husband may constitute persecution of the husband, petitioners failed to present evidence in the administrative record (let alone sufficiently compelling evidence to warrant overturning the Board's decision) that any such action in Kenya would be "on account of" Mr. Gatimi's status as a former member of the Mungiki.

Moreover, Mrs. Gatimi did not herself seek asylum, but rather had the potential to receive derivative asylum status from her husband's asylum application (based on his own refugee status). See 8 U.S.C. 1158(b)(3)(A) (authorizing derivative asylum status to alien's spouse and children if the alien himself "is granted asylum"); 8 C.F.R. 1208.21 (derivative asylum may be granted for spouse and children of the "principal alien who was granted asylum"). Mrs. Gatimi's own fear of persecution does not alter Mr. Gatimi's burden to show that he is a refugee based on a his own reasonable fear of future persecution on account of his membership in a particular social group. At the very least, the Board's analysis of

this issue was reasonable and therefore substantially justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

FRANCIS GATIMI, JANE GATIMI, & COLLINS GATIMI,
Petitioners,

v.

ERIC H. HOLDER, JR.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. BY EXCLUDING THE IJ'S DECISION (WHICH THE BIA DID NOT ADDRESS) FROM THE DEFINITION OF "THE POSITION OF THE UNITED STATES," THE SEVENTH CIRCUIT SQUARELY DEPARTED FROM OTHER CIRCUITS 2

II. THE SEVENTH CIRCUIT'S APPROACH TO ANALYZING WHETHER THE GOVERNMENT WAS "SUBSTANTIALLY JUSTIFIED," TREATING EACH ISSUE IN A VACUUM WITHOUT ANALYZING ITS IMPACT ON THE OVERALL CASE, EXACERBATED AN ALREADY-EXISTING CIRCUIT SPLIT. 6

III. THE PETITION PRESENTS A FULLY-VETTED VEHICLE FOR RESOLVING BOTH QUESTIONS PRESENTED AND ENSURING THAT THE EAJA CONTINUES TO ALLOW INDIVIDUALS TO CHALLENGE ERRONEOUS ACTIONS BY THE GOVERNMENT 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

CEMS, Inc. v. United States,
65 Fed. Cl. 473 (2005) 11

Commissioner, INS v. Jean,
496 U.S. 154 (1990) 1, 5, 8, 9

Ghebremedhin v. Ashcroft,
392 F.3d 241 (7th Cir. 2004) 4

Haitian Refugee Ctr. v. Meese,
791 F.2d 1489, *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986) 6

INS v. Ventura,
537 U.S. 12 (2002) (per curiam) 3

Koon v. United States,
518 U.S. 81 (1996) 10

Liu v. Ashcroft,
380 F.3d 307 (7th Cir. 2004) 3

Nken v. Holder,
385 F. App'x 299 (4th Cir. 2010) (per curiam) 8

Perales v. Casillas,
950 F.2d 1066 (5th Cir. 1992) 5

Pierce v. Underwood,
487 U.S. 552 (1988) 10

Roanoke River Basin Ass'n v. Hudson,
991 F.2d 132 (4th Cir. 1993) 6, 9

Russell v. Nat'l Mediation Bd.,
775 F.2d 1284 (5th Cir. 1985) 6, 7

Thangaraja v. Gonzales,
428 F.3d 870 (9th Cir. 2005) 2, 4, 5

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. 22249 Dolorosa Street,
190 F.3d 977 (9th Cir. 1999) 7

United States v. Rubin,
97 F.3d 373 (9th Cir. 1996) 6, 7

Yee v. City of Escondido,
503 U.S. 519 (1992)..... 12

REPLY BRIEF FOR PETITIONERS

"'Providing an award of fees [under the EAJA] to a prevailing party represents one way to improve citizen access to courts and administrative proceedings.'" *Commissioner, INS v. Jean*, 496 U.S. 154, 165 n.14 (1990) (quoting the EAJA's legislative history). As the petition demonstrated, this Court's review is urgently needed to resolve two square conflicts among the circuit courts concerning aspects of the EAJA. These questions are of critical importance in leveling the playing field between individuals with limited resources, on the one hand, and the United States government, on the other. The Court's resolution of either or both of these questions could thus impact thousands of administrative and judicial proceedings in this country.

Arguing that no conflict exists, Respondent misconstrues this Court's precedent as well as the administrative and Seventh Circuit's decisions in this case. Respondent also raises vehicle objections that are irrelevant to the questions presented by the petition. In all, nothing in the opposition brief reconciles the Seventh Circuit's two erroneous holdings with contrary approaches taken by other circuit courts, or provides any reason for this Court to put off bringing order to this chaos.

For the reasons stated here and in the petition, this Court's review is essential to ensure that the EAJA continues to improve access to the courts for those otherwise least able to afford it. The petition for a writ of certiorari should be granted.

I. BY EXCLUDING THE IJ'S DECISION (WHICH THE BIA DID NOT ADDRESS) FROM THE DEFINITION OF "THE POSITION OF THE UNITED STATES," THE SEVENTH CIRCUIT SQUARELY DEPARTED FROM OTHER CIRCUITS.

The Seventh Circuit's erroneous holding that issues resolved by the IJ and unaddressed by the BIA must be excluded from the EAJA analysis is squarely in conflict with decisions of other circuits. Pet. 8-12. In *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005), for example, the court held that the EAJA's term "position of the United States" includes not only the government's "litigation position," but also "the underlying agency decision rendered by the BIA or an IJ." The court further explained, "the manner in which responsibilities are divided within the executive branch is immaterial to determining what the statutory language requires." *Id.* The Court should grant the petition to resolve this circuit split.

Respondent argues that no conflict exists because (1) "the Board and the government's lawyer rejected" the IJ's past persecution analysis (Opp. 8 (quoting Pet. App. 38a)), (2) "the rationale of an immigration judge is not part of the agency action under review unless the Board adopts or otherwise incorporates that reasoning" (Opp. 11), and (3) *Thangaraja* dealt with the BIA's summary affirmance without an opinion (Opp. 11-12). But none of these reasons resolves the conflict. Instead, each either relies on an incorrect understanding of the procedural posture of this case, or misconstrues the nature of the circuit split.

First, the BIA did not "reject" the IJ's past persecution analysis. In full, the BIA's discussion on that point was as follows: "we find that the lead respondent failed to meet his burden of proof for asylum, *even if he established that his past harm amounts to persecution*." Pet. App. 16a (emphasis added). The BIA did not say that the lead respondent (Mr. Gatimi) in fact established past persecution. Instead, it assumed away this issue for purposes of the argument, concluding that the issue did not matter because Mr. Gatimi did not meet the remaining requirements for asylum. *See id.* The past persecution issue thus remained in dispute when the case arrived at the Seventh Circuit.

Second, because the BIA had not rejected the IJ's past persecution finding, Petitioners could not ignore it in briefing before the Seventh Circuit. When the BIA's decision merely supplements the IJ's, "the IJ's opinion, as supplemented by the BIA's opinion, becomes the basis for [Seventh Circuit] review." *Liu v. Ashcroft*, 380 F.3d 307, 311 (7th Cir. 2004). Respondent does not mention *Liu*, which Petitioners cited (Pet. 9), instead mistakenly claiming that "Petitioners cite no . . . authority" of this sort (Opp. 11). Since the Seventh Circuit could have reached the issue of past persecution, Petitioners' counsel (as any prudent counsel would have done) briefed it. Pet. 9. Otherwise, the Seventh Circuit could have affirmed the IJ on that ground, potentially resolving a dispositive argument against Petitioners without having the benefit of Petitioners' argument.

Respondent also suggests, citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), that the Seventh Circuit could not have addressed the IJ's past

persecution analysis and would have been required to remand for the BIA to address it in the first place. Opp. 10-11. Not so. As the Seventh Circuit had explained in a different case, "we do not agree that *Ventura* stands for the broad proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified." *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004). Instead, "the issue in *Ventura* was whether [an appellate court] impermissibly usurped the BIA's fact-finding role." *Id.* When, as here, an issue requires no new fact-finding, appellate courts can rule on the IJ's determination, even if not adopted by the BIA. *See id.*

It may be that the Seventh Circuit would have declined to rule on the past persecution issue and would have remanded so that the BIA could first make that determination. Or it might not have. But the important point here is that the Seventh Circuit *could have* addressed it without the BIA's input. And therefore, Petitioners could not ignore the issue, but instead had to expend resources in briefing it as part of their Seventh Circuit proceedings.

Finally, because Petitioners could ill afford to ignore the past persecution finding in their Seventh Circuit briefing, this case is in all relevant respects squarely at odds with the Ninth Circuit's decision in *Thangaraja*. Respondent argues that the distinction between the two cases lies in *Thangaraja*'s procedural posture, where the BIA issued no opinion, instead summarily affirming the IJ's decision. Opp. 11-12. But that is a distinction without a difference. In both cases, asylum applicants sought Article III appellate court review and addressed in their briefs

IJs' decisions. In both cases, the applicants struggled to find valuable resources to litigate against the government's positions that lacked substantial justification. That is why the EAJA protects the applicants in both cases by shifting to the government the cost of its unreasonable positions. As the Ninth Circuit recognized, "the manner in which responsibilities are divided within the executive branch [*e.g.*, between IJs and the BIA] is immaterial to determining what the statutory language requires." *Thangaraja*, 428 F.3d at 874. And, to distinguish the two cases as Respondent proposes to do here would resurrect "for the average person the financial disincentive to challenge unreasonable governmental actions"—precisely the disincentive the EAJA is intended to eliminate. *Jean*, 496 U.S. at 163.

Along the same lines, Respondent misses the point when he tries to address the tension between the Seventh Circuit's holding and those of the Second, Third, Fifth, and Tenth Circuits by claiming "[n]o such tension exists." Opp. 12 n.2. The tension is plainly there because, unlike the Seventh Circuit, those others recognize that the term "position of the United States" includes *all* "underlying agency misconduct giving rise to the suit." *E.g.*, *Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992); *see also* Pet. 12 (citing other circuits' similar holdings). This underlying misconduct includes misconduct at the IJ level, provided that the BIA does not expressly cure it by rejecting the IJ's erroneous analysis. Had the Seventh Circuit followed this approach, it would have considered the IJ's analysis in determining whether the government's position was substantially justified. But the court did not, in tension with the Second,

Third, Fifth, and Tenth Circuits, and squarely in conflict with the Ninth Circuit.

The Court should resolve this square conflict.

II. THE SEVENTH CIRCUIT'S APPROACH TO ANALYZING WHETHER THE GOVERNMENT WAS "SUBSTANTIALLY JUSTIFIED," TREATING EACH ISSUE IN A VACUUM WITHOUT ANALYZING ITS IMPACT ON THE OVERALL CASE, EXACERBATED AN ALREADY-EXISTING CIRCUIT SPLIT.

The Seventh Circuit's denial of Petitioners' request for EAJA fees exacerbated a second well-established circuit conflict concerning when the government's position is not "substantially justified," a statutory prerequisite for an award of EAJA fees. Pet. 12-17. Before this case, on the one hand, the Fourth, Fifth, and Eleventh Circuits would grant a full EAJA award if the position of the United States was only partly justified. *See Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1291-92 (5th Cir. 1985); *Haitian Refugee Ctr. v. Meese*, 791 F.2d 1489, 1500, *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993); Pet. 13-15. The Ninth Circuit, on the other hand, would allocate the EAJA award when the government's position is only partly justified. *See United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996); Pet. 16. To what was already a two-way split, the Seventh Circuit in this case added a third dimension by erroneously denying fees *in their entirety* because the government was substantially justified on what it viewed as the more "prominent" of the two issues in the case. That

approach is squarely at odds with the approaches used in other circuits. On this issue, too, this Court's guidance is urgently needed.

Respondent tries to unify the three divergent approaches, to no avail. To begin with, Respondent downplays parts of the other circuits' approaches that contradict Respondent's theory by calling them "dicta." Opp. 14, 16. But they are not. The part of *Russell* that Respondent labels "apparent dicta" (Opp. 14) is one of that case's holdings: "We *hold* that in computing Russell's attorney fees on remand, the district court should consider the time spent presenting the entire case," which includes time spent challenging the government's substantially justified positions. 775 F.2d at 1292 (emphasis added). So, too, Respondent erroneously labels "dicta" (Opp. 16) the *Rubin* court's explanation—constituting a part of its *reasoning*—that "[t]here may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the unjustified portion." 97 F.3d at 375. And in any event, a subsequent Ninth Circuit decision cites *Rubin* in analyzing the EAJA fee award in a case where an initially justified position becomes unjustified in the course of litigation. *See United States v. 22249 Dolorosa Street*, 190 F.3d 977, 982 (9th Cir. 1999). Respondent's only answer to *Dolorosa* is to call it a case "involv[ing] only one legal issue," thus not implicating the allocation question. Opp. 16 n.3. But that is misleading because, as demonstrated above, *Dolorosa* involved a mixture of justified and unjustified positions. That both related to the same "legal issue" is irrelevant to the question of what to do with EAJA fees in cases where the

government's position is justified only in part. Respondent cannot demonstrate lack of conflict by labeling conflicting portions as "dicta" and pretending they do not matter. And more generally, as the petition and the brief in opposition both demonstrate, the field here is simply not as clear as Respondent attempts to portray it. *See, e.g.*, *Nken v. Holder*, 385 F. App'x 299, 302-03 (4th Cir. 2010) (per curiam) (allocating an EAJA award without even acknowledging that the court's earlier approach in *Roanoke* would justify awarding EAJA fees in full).

But even if Respondent were correct in his presentation (and he is not), Respondent's arguments would still demonstrate a conflict between the Seventh Circuit and all other courts to apply the substantial-justification analysis. As Respondent's own brief frames the discussion, the conflict would be between the Seventh Circuit's substantial-justification approach, which analyzes substantial justification by treating each issue in a vacuum, and the approach of all other circuits, which all take their cue from this Court's decision in *Jean* and consider each issue's effect on the case as a whole. Respondent agrees (Opp. 13), as he must, that this Court's decision in *Jean* requires a single determination whether "the position of the United States" is substantially justified. 496 U.S. at 161-62. Each case must be treated "as an inclusive whole, rather than as atomized line-items." *Id.* And Respondent further argues that other circuits' decisions faithfully apply *Jean*'s holding. For example, the Fourth Circuit explained that "a more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's 'position' in the entire case as

unreasonable." *Roanoke*, 991 F.2d at 139. Similarly, "a broader government position that, considered in a vacuum, would not be clearly egregious might still, in the overall context of the case, constitute an unreasonable position because of its impact." *Id.*

But even under this analysis, *Jean* and other circuits are clear: for purposes of analyzing the "substantial justification" issue, the government's position on each issue is not to be taken in a vacuum, but must be analyzed in light of its impact on the case as a whole. Overall context matters a great deal. That is where the Seventh Circuit, contrary to Respondent's argument, again goes its own way. Of the two issues that the Seventh Circuit addressed, it concluded that the "social-visibility issue was the more prominent issue and the government's position on that issue was substantially justified." Pet. App. 43a. The court "therefore conclude[d] that the government's position was substantially justified as a whole." *Id.* That analysis thus simply weighed the issues in the case against one another (albeit on a scale whose metric is far from objectively-verifiable). It did not even attempt to consider the impact of the less "prominent" issue (Mrs. Gatimi's fears of being subjected to female genital mutilation ("FGM") upon return to Kenya) on the case as a whole. Had the court considered that impact, it would have recognized that the issue of Mrs. Gatimi's fear of FGM, if resolved correctly by the BIA, would have resulted in the grant of asylum, obviating the need for Petitioners to seek the Seventh Circuit's review. Pet. 15. Performing instead the kind of line-item analysis rejected by *Jean* and other circuits, the Seventh Circuit erred as a matter of law and exacerbated an existing circuit split. Pet. 16.

Thus, even Respondent's (misguided) analysis shows only that the Seventh Circuit's approach represents legal error and contradicts the approach of all other circuits to have considered the issue of substantial justification. That is still a square circuit split.[1] Whether analyzed as Respondent or Petitioners frame it, this conflict, too, is real and warrants this Court's review.

III. THE PETITION PRESENTS A FULLY-VETTED VEHICLE FOR RESOLVING BOTH QUESTIONS PRESENTED AND ENSURING THAT THE EAJA CONTINUES TO ALLOW INDIVIDUALS TO CHALLENGE ERRONEOUS ACTIONS BY THE GOVERNMENT.

Finally, as the petition demonstrated, this case presents a well-suited vehicle for resolving both questions presented. Pet. 17-19. The issues are fully vetted and, their resolution being critically important to individuals and families seeking immigration relief, these issues potentially affect thousands of administrative and judicial proceedings in this country.

Respondent sees this case as "a poor vehicle" (Opp. 16-18), but it is his reasons, and not the vehicle, that

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[1] And because the split implicates legal error, Respondent's citation to the abuse-of-discretion standard of review is misleading. Opp. 12 (citing *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988)). A court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). This Court's review of the Seventh Circuit's approach to resolve this circuit split would thus be *de novo*.

are lacking. *First*, Respondent highlights a point that Petitioners readily acknowledged in the petition—the "Seventh Circuit initially did not address allocation because the Gatimis did not ask for it, requesting a full award instead." Pet. 17 n.2; Opp. 17. Aside from the fact that Petitioners did ask for allocation at the earliest practicable time (Pet. 17 n.2), they did not have to do even that because courts typically construe requests for 100% of fees as subsuming requests for anything in between zero and 100%. *See, e.g., CEMS, Inc. v. United States*, 65 Fed. Cl. 473, 483-85 (2005). And besides, the allocation issue is at best tangential to the second question presented in the petition, which deals with the Seventh Circuit's approach to the threshold issue whether the government's overall position is substantially justified. Petitioners illustrated the allocation approach of the Ninth Circuit only to demonstrate a three-way circuit split. On the merits, however, Petitioners plan to argue that the correct approach is that of the Fourth, Fifth, and Eleventh Circuits, which allow recovery of all fees if the government is substantially justified on less than all issues.

Second, Respondent argues that the Seventh Circuit erred in holding that the government was not substantially justified on the issue of Mrs. Gatimi's fear of FGM. Opp. 17-18. This argument comes too late. The government did not cross-petition for reconsideration on this part of the Seventh Circuit's opinion. Moreover, the argument has nothing to do with this petition because neither of the two questions presented depends on whether the Seventh Circuit erred in concluding that the government was not substantially justified on the FGM issue. *Cf. Yee*

v. City of Escondido, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). The court's conclusion on that issue is taken as correct (as it must be) for purposes of this petition.

In sum, Respondent's arguments notwithstanding, this petition remains a well-suited vehicle for resolving both questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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